MUNICIPAL BOARD DECISIONS

VOLUME FOUR-A/1985

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

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* * * * *

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THIS VOLUME CONTAINS ALL ASSESSMENT DECISIONS FROM JANUARY 1, 1985, TO DECEMBER 31, 1985.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

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This is an appeal from a decision of the Colchester Regional Assessment Appeal Court confirming the 1984 commercial assessment of the Appellant's land, open air viewing screen, building containing a canteen, washrooms and projection room and ticket booth in the amount of $65,000.00. The property sold in May 1982 for a price indicated in the Deed Transfer Tax Affidavit as $60,000.00. The property was listed for sale since the Spring of 1983 without written offers and the Appellant was prepared to accept an oral offer of $50,000.00.

HELD: The appeal is allowed and the Appellant's assessment reduced to $55,700.00, without costs.

The market data comparison approach is not appropriate here. The cost method is acceptable and the Board accepts the assessor's estimates of replacement cost of the structures, physical depreciation and land values. However, his estimate of total depreciation is deficient because it did not provide for a loss in value due to economic obsolescence. The subject property lost value because of the rapid growth of the home video industry and stricter Provincial government regulations. While the assessor might not have been aware of these adverse economic factors, they existed on Dec.1,1983 and should be taken into account. A rate of 25% should be applied to the existing depreciated replacement cost for economic obsolescence. No costs are awarded as the appeal might have been avoided if the Appellant had advised the assessor that it would not be operating in 1984 or if it had appeared before the Regional Assessment Appeal Court to argue its case.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967 Chapter 14 as amended;

- and -

IN THE MATTER OF: An Appeal by Scotia Drive-Ins Limited (formerly known as D. & P. Theatres Limited) from the decision of the Regional Assessment Appeal Court, Colchester Assessment Region made May 8, 1984

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: WALTER NEWTON, LL.B. for the Appellant,

WILLIAM WILSON, LL.B., for the Director of Assessment.

DECISION

This is an Appeal by Scotia Drive-Ins Limited (formerly known as D. & P. Theatres Limited) from the decision of Robert A. Stroud, Chairman of the Regional Assessment Appeal Court, Colchester Assessment Region dated May 8, 1984 by which the 1984 assessment in the amount of $65,000.00 of the Appellant's commercial property consisting of land, an open air viewing screen, a building containing a canteen, washrooms and projection room and a ticket booth in Hilden, Colchester County was confirmed.

The Appellant's Notice of Appeal is dated May 24, 1984 and it was received by the Board on May 31, 1984. The hearing of the appeal took place in the Supreme Court Room, the Court House, Church Street, Truro, Nova Scotia. There was no objection to the Board's jurisdiction to hear the appeal and the Board heard evidence on the merits of the appeal.

The Grounds of Appeal stated in the Notice of Appeal are as follows:

> "1) The Regional Assessment Appeal Court failed to give proper consideration to the contention of the Appellant with regard to the diminished value of the real property and the business occupancy;
>
> 2) The Regional Assessment Appeal Court improperly placed reliance on valuations of other properties used for purposes of drive-in theatres when the property in question was non-operational and could not be properly compared in value to drive-in operations which were in business; and,
>
> 3) Such other grounds as may on the hearing of this Appeal be proven."

The only witnesses to give evidence were Terry Whynot, C.A., on behalf of the Appellant and Bruce Tattrie, N.S.I.A., on behalf of the Director of Assessment.

Terry Whynot is the Treasurer and a shareholder of the Appellant company. The company was originally incorporated under the name D. & P. Theatres Ltd., in May 1982. The name was later changed to Scotia Drive-Ins Limited. The company was incorporated for the specific purpose of acquiring and operating the drive-in theatres located at Lower South River, Antigonish County and Hilden, Colchester County.

Mr. Whynot said that the total price paid for both drive-in theatres including equipment in May 1982 was $92,000.00 and that the purchase price was apportioned evenly between the two locations for purposes of the Appellant's accounting records. He also stated that at the time of purchase, the Hilden Drive-In Theatre had approximately $5,000.00 more in equipment value than the Lower South River Drive-In Theatre but the land area of the Hilden property was 10 acres less than the land area of the Lower South River property.

Mr. Whynot said that both drive-in theatres ceased operating in September 1983. The Hilden Drive-In Theatre was listed for sale with a real estate company in the Spring of 1983 for $75,000.00 including equipment. The current asking price for the Hilden Drive-In Theatre is $67,000.00 including equipment. According to Mr. Whynot, no written offers have been received on the subject property.

The Lower South River Drive-In Theatre was listed for sale in the Spring of 1983 at a price of $71,000.00 including equipment. The current asking price for this property is $63,000.00 including equipment. According to Mr. Whynot, no offers have been received on this property.

According to Mr. Whynot, there is a declining market for Drive-In Theatres because of the rapid expansion of the home-video indsutry and stricter provincial government guidelines on the showing of Sunday night "adult movies".

Mr. Whynot said that there is no use for the subject property in its present state other than as a drive-in theatre and that there is no indication that the drive-in theatre business is "coming back to life".

Mr. Whynot stated that the Assessor was incorrect to use only the cost method to estimate the market value of the subject property because it resulted in an inaccurate estimate of market value. In Mr. Whynot's opinion, the direct sales comparison method could have been used by the assessor. He points out that the subject property was purchased in May 1982 which was only eight month's prior to the January 1, 1983 date used by the Assessor for valuing the subject property. He also stated that the Assessor could have checked the asking price for the Enfield Drive-In Theatre which was listed for sale on January 1, 1983.

Mr. Whynot stated that the subject property likely would sell with equipment for under $50,000.00.

On cross-examination, Mr. Whynot stated that the Appellant only operated the drive-in theatres in 1982 and 1983. A general manager was hired to operate the theatres in 1982 but the officers of the Appellant operated the theatres in 1983. The officers had no previous experience in the drive-in theatre business. Mr. Whynot also stated that the Appellant received an informal offer to purchase the subject property for $50,000.00 but the potential purchaser backed out of the purchase.

Bruce Tattrie is employed as an Assessor in the Colchester Regional Assessment Office. He has 13 years experience as an assessor. He prepared the assessment report relating to the subject property filed as Exhibit D-3. At Page 19 of his report Mr. Tattrie states:

> " Having given consideration to all factors, supported by the Reproduction Cost less Depreciation Approach, which in my opinion is the appropriate approach to find an estimate of market value for this property, I submit the value of the subject to be Sixty Five Thousand Dollars ($65,000.00)."

Mr. Tattrie is very familiar with the subject property. He visits the property every three years for an on-sight inspection and every year he drives by the property to check for any external alterations. He also visited the subject property in August 1984 when preparing his assessment report for this appeal.

The subject property is an interior parcel of land located 200 feet east of Highway NO. 2 in Hilden, Colchester County approximately three miles from the downtown area of Truro. The lot comprises 8.88 acres with 6.21 acres used for theatre purposes and the remaining 2.67 acres covered with bushes. Access to the property is by a right-of-way which measures 100 feet along the highway. The structures on the lot include a viewing screen, a ticket booth and a building containing a canteen, washrooms and projection room.

The land use in the area is a mixture of residential, farming and commercial. The subject land is not zoned.

According to Mr. Tattrie, a drive-in theatre has operated on the subject site continuously since 1953. The drive-in theatre did not operate in 1984. At the time Mr. Tattrie prepared the 1984 assessment for the subject property, he was not aware of the trend in the drive-in theatre industry. He stated that shortly before the present hearing he had a conversation with George Gilbert, who installs sound systems at drive-in theatres. Mr. Gilbert indicated to Mr. Tattrie that stricter Provincial Government regulations had adversely affected the drive-in theatre business.

Mr. Tattrie estimated the market value of the subject property using the cost method. He did not estimate the market value of the subject property by the direct sales comparison method because of the lack of sales of comparable drive-in theatres. According to Mr. Tattrie, the drive-in theatre located in Elmsdale, Hants County, was listed for sale but had not sold at the time he prepared the 1984 assessment for the subject property. He also stated that the drive-in theatre located in Sackville, Halifax County was not operating when the land which had been previously used as a drive-in theatre was purchased with the intention that it be used for another purpose. Mr. Tattrie further stated he was not able to get information on the sale on the drive-in theatre located in New Glasgow which was purchased by one of the Sobey's companies. He was informed by an assessor in the New Glasgow area that the assessed value of the New Glasgow theatre was $232,000.00 and that it was a much larger theatre than the subject theatre.

Mr. Tattrie did not use the income method because of the difficulty in estimating rental income and capitalization rates.

In determining the market value of the subject property by the cost method, Mr. Tattrie used Boeckh's V-Day Manual as a guide in calculating the replacement cost of the viewing screen, the ticket booth and the canteen and projection building. He estimated the reproduction cost of the viewing screen in the amount of

$32,417.00, the reproduction cost of the canteen and projection building in the amount of $31,912.00 and the reproduction cost of the ticket booth in the amount of $1,289.00. He applied physical depreciation at the rate of 30% for the viewing screen and the viewing booth and 40% for the canteen and projection building. He did not make any allowance for functional or economic obsolescence. His estimated depreciated reproduction cost is $22,691.00 for the viewing screen, $19,147.00 for the canteen and projection building and $902.00 for the ticket booth. He estimated the land value to be $23,600.00. Adding these last four figures, Mr. Tattrie arrived at $66,340.00 as the estimated value of the subject property by the cost method which he rounded to $65,000.00.

In estimating the land value in the amount of $23,600.00, Mr. Tattrie had regard to the sale of four parcels of bulk land, three of which were located in the immediate vicinity of the subject property. Based on the information derived from the sale of these properties, he estimated the value of the 6.21 acres used for a drive-in theatre at $2,000.00 per acre which results in a total value of $12,400.00; the value of the 100 x 200 foot right-of-way at $10,000.00; and the value of the remaining 2.67 acres which is covered with bushes at $1,200.00.

On cross-examination Mr. Tattrie said that the market value of the subject property for assessment purposes would be less if the theatre was not operating. He also stated that he would reduce the market value of the subject property for assessment purposes in 1985 if the theatre still was not operating at the time the assessment roll was prepared for the 1985 assessment year. He said he did not reduce the market value of the subject property for the 1984 assessment year because he was not aware and he was not informed that the theatre would not be operating during 1984. Mr. Tattrie stated that without further analysis he could not quantify the amount of reduction in the market value of the subject property for the current year to take into account the fact that the theatre was not operating. He agreed with the suggestion of Counsel for the Appellant that the viewing screen could not be used for any purpose other than the viewing of movies at this particular drive-in theatre and that its salvage value was minimal. Mr. Tattrie stated that in order to provide for the loss in market value of the subject property due to the fact that the theatre was not operating, he would increase the amount of total depreciation under the the cost method by providing for an allowance for economic obsolescence.

Mr. Tattrie said that the Deed Transfer Tax Affidavit filed by the Appellant when it purchased the subject property indicated a transfer price of $60,000.00. In Mr. Tattrie's opinion, this value was low because the property was purchased at a liquidation sale. He stated that he relied upon the $60,000.00 transfer price as an indication of the lower end of the market value for the subject property.

Counsel for the Appellant submits that there was a substantial reduction in the market value of the subject property for assessment purposes when the drive-in theatre ceased operating. He also submits that the drive-in theatre industry has collapsed and drive-in theatres are not selling. He further submits that the market value of the subject property should be closer to $46,000.00,which represents the Appellant's allocation of one-half of the purchase price of $9,200.00 for both theatres, than the assessor's estimate of $65,000.00. Counsel for the Appellant submits that when one considers the price paid for the property in May 1982 and the fact that the market for drive-in theatres has decreased substantially since that date, the $65,000.00 market value estimated by the assessor is too high and a more realistic market value would be in the vicinity of $50,000.00 to $55,000.00.

Counsel for the Director submits that the Appellant did not provide the Board with any evidence of market value for the subject property. Further he submits that the evidence provided by the Appellant supports the assessor's opinion of market value of $65,000.00. He suggests that it is too soon to write off the subject property as a drive-in theatre. He points to the fact that the Appellant has both the subject property and the Antigonish County property listed for sale in excess of $60,000.00. Counsel for the Appellant submits that the cost method used by the assessor was the appropriate method to use under the circumstances. He also submits that the Appellant has not disputed the calculations of the assessor under the cost method and the assessment should be confirmed in the amount of $65,000.00.

In the opinion of the Board, the market data comparison method is not appropriate in this instance. The only evidence of sales of comparable property was the sale of the subject property in May 1982, eight months prior to the effective date of the 1984 assessment and that evidence was not conclusive. Mr. Whynot, the

Appellant's treasurer stated that the purchase price of the subject property was $46,000.00 but the Deed Transfer Tax Affidavit filed by the Appellant at the time of purchase indicated the purchase price was $60,000.00.

The Board agrees with Counsel for the Director, that the cost method is an acceptable method of valuation and its use is appropriate in this instance. The Board accepts the assessor's estimates of replacement cost of the structures, physical depreciation and land value. Mr. Tattrie is an experienced assessor familiar with the subject property and the mechanics of the cost approach and the Appellant did not dispute his estimates of replacement cost, land value and allowance for physical depreciation.

However, in the opinion of the Board, Mr. Tattrie's estimate of total depreciation is deficient because he did not provide for a loss in value due to economic obsolescence.

Economic obsolescence is defined at Page 11 of Mr. Tattrie's assessment report filed as Exhibit D-3 as follows:

> "Economic Obsolescence is loss in value caused by unfavourable economic influence occurring outside a structure."

In the opinion of the Board, the rapid growth of the home video industry and stricter Provincial government regulations have adversely affected the drive-in theatre industry. Mr. Tattrie should have provided for a loss in value to the subject property caused by these unfavourable economic influences.

Section 64(1A) of the Assessment Act reads as follows:

> " The assessment shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll."

While the assessor may not have been aware of these adverse economic factors when he prepared the 1984 assessment, in the opinion of the Board, they existed on December 1, 1983 and should be considered in determining the market value of the subject property for the 1984 assessment year.

A more difficult problem is measuring the amount of economic obsolescence. The Deed Transfer Tax Affidavit indicated the purchase price of the subject property in May 1982 at $60,000.00. The sworn evidence of Mr. Whynot indicates that the Appellant was prepared to accept an oral offer to purchase the subject property for $50,000.00 in 1984 but the purchaser did not complete the purchase. The subject property has been exposed to the market through real estate listings since the Spring of 1983 without any written offers to purchase.

In the opinion of the Board, a rate of 25% should be applied to the existing depreciated replacement cost of the structures of $42,740.00 to account for economic obsolescence. This results in economic obsolescence of $10,685.00 and reduces the depreciated replacement cost of the structures from $43,740.00 to $32,055.00. Adding the land value of $23,600.00 to the depreciated replacement cost of the structures of $32,055.00, the Board arrives at $55,655.00 as the estimated market value of the subject property by the cost method, rounded to $55,700.00.

The Board does not award costs. The Appellant may have avoided the appeal of its assessment to the Regional Assessment Appeal Court if it had advised the assessor that the drive-in theatre would not be operating in 1984 and a further appeal to this Board if it had appeared at the Regional Assessment Appeal Court to argue its case.

In the result, the Board allows the appeal and reduces the commercial assessment of the Appellant's property in Hilden, Colchester County, for the 1984 assessment year from $65,000.00 to $55,700.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 25th day of January, 1985.

Darryl W. Wilson

DARRYL W. WILSON

Daemen v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--MARKET DATA SALES COMPARISON APPROACH--REPLACEMENT COST APPROACH--N.S. RESIDENTIAL ASSESSMENT MANUAL--ASSESSMENT ACT, S.84(4)

This is an appeal from a decision of the Antigonish-Guysborough Regional Assessment Appeal Court which reduced the Appellant's 1984 residential assessment of his land, dwelling and garage from $47,400.00 to $44,400.00 because the property lacked a dependable water supply. The property was originally assessed in 1984 at $42,000.00, but was increased upon review by the Director of Assessment to $47,400.00 because a value for the finished basement had not been included.

HELD: The appeal is allowed and the 1984 assessment is reduced to $40,200.00. The Appellant is entitled to costs in the amount of $75.00.

The direct sales comparison method is a preferred method to use in estimating market value when there is ample evidence of recent sales of comparable properties. Here there are too many substantial differences with the comparables requiring adjustment to use this method as a reliable indication of market value. The Board accepts the assessor's estimate of replacement cost of the garage, physical depreciation and the well and septic system, but the assessor's estimate should be reduced to take into account: 1. the swamp area in front of the lot; 2. a 10% allowance for locational obsolescence because the property does not have a reliable water supply; and 3. the classification of the dwelling under the Nova Scotia Residential Assessment Manuel as 3B rather than 3A, with a 5% increase to reflect some features of a class 3A dwelling.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act,
R.S.N.S. 1967, c. 14, as amended;

- and

IN THE MATTER OF: An Appeal by PETER DAEMEN,
from a decision of the Regional Assessment
Appeal Court, Antigonish-Guysborough
Assessment Region,

BEFORE: DARRYL W. WILSON, C.A., LL.B

COUNSEL: The Appellant was represented by his son, HARRY DAEMEN, without counsel;

WILLIAM WILSON, LL.B, for the Director of Assessment.

DECISION

This is an appeal by PETER DAEMEN from a decision of the Regional Assessment Appeal Court, Antigonish-Guysborough Assessment Region dated April 27, 1984, by which the 1984 assessment of the Appellant's residential property consisting of land, dwelling and garage located at Brierly Brook, Antigonish County was reduced from $47,400.00 to $44,400.00.

The Appellant's Notice of Appeal is dated May 22, 1984, and it was received by the Board on May 29, 1984. The Notice of Appeal is lengthy and sets forth evidence and argument by the Appellant with respect to his appeal. The substance of the Notice of Appeal is that the subject property was over-valued for the 1984 assessment year.

There were no objections to the Board's jurisdiction and the Board assumed jurisdiction to hear the merits of the appeal.

Evidence was given by Harry Daemen, son of the Appellant, on the Appellant's behalf, and Lloyd MacLellan on behalf of the Director of Assessment.

The subject property, containing 2.8 acres, is improved with a one-storey (22' x 32') bungalow and detached garage (20' x 28'). It is located at Brierly Brook, Antigonish County, approximately 6 kilometers west of the Town of Antigonish on Highway No. 4. There is a large swamp area between the highway and the dwelling which is used as a duck pond. The dwelling was constructed in 1979 by the Appellant in anticipation of his impending retirement. The main floor has 704 square feet of ground floor area consisting of a living room, kitchen, one bedroom and a bath. The basement area contains 525 square feet of finished area consisting of two bedrooms, a recreation room and a bath. The property has a dug well and septic tank and disposal field. The well is fed by rain water which runs off the roof. It runs dry in the summer months after prolonged dry spells.

The house was constructed without any contracted labour and with inexpensive materials with a view to keeping costs to a minimum. Some of the cost-saving measures included the use of rough, undressed lumber throughout, used bath fixtures, joists spaced at 24-inch intervals instead of the usual 16-inch intervals, basement walls 8 inches thick instead of the normal

10 inches. The floor covering in the basement is directly over the concrete floor, there is no baseboard trim in the basement area, plumbing in the basement bath consists of a wall-hung sink, a toilet and a shower stall and there is only two inches of insulation in the basement area.

The Appellant purchased the land in 1979 for $500.00. According to Henry Daemen, this was a fair market price for the land in 1979 considering that a swamp covered the front part of the property and the surrounding properties had well-water difficulties. At the time of purchase in 1979, the Appellant was hopeful he could get water by connecting to the Town of Antigonish water mains. This did not occur because of the expense in extending water lines to service his area.

The assessed value of the Appellant's property for the 1984 assessment year was originally set at $42,000.00. When the Appellant appealed his 1984 assessment, the Director of Assessment, on a review of the assessment pursuant to Section 84(4) of the Assessment Act, amended the original assessment by increasing it from $42,000.00 to $47,400.00 because the original assessment did not include a value for the finished basement. The Appellant was dissatisfied with the amendment and continued his appeal to the Regional Assessment Appeal Court which reduced the assessment from $47,400.00 to $44,400.00 because the property lacked a dependable water supply.

The Appellant suggests that the market value of the subject property for assessment purposes should be $37,000.00 consisting of $2,000.00 for land, $3,400.00 for garage and

$30,600.00 for the dwelling.

Appearing as a witness on behalf of the Director of Assessment was Lloyd MacLellan, N.S.I.A., a senior assessor with the Antigonish-Guysborough Assessment Region. He prepared an assessment report which was filed as Exhibit D-3. Prior to beginning his assessment report, Mr. MacLellan visited the subject property, thoroughly inspected the exterior and interior of the dwelling and the garage and spoke with the Appellant who informed him of the deficiencies in construction of the dwelling and the problems with the water supply. Mr. MacLellan stated that he took the Appellant's comments into account in determining the market value of the subject property.

Mr. MacLellan estimated the market value of the subject property to be $46,000.00 by the direct sales comparison method and $47,600.00 by the cost method.

In estimating the market value of the subject property by the direct sales comparison method, Mr. MacLellan selected six property sales to compare to the subject property. At page 15 of his report, Mr. MacLellan states:

> "ESTIMATE OF VALUE BY THE DIRECT
> SALES COMPARISON APPROACH
>
> The Market Data or Sales Comparison Approach is a direct method for finding the market value of real property. It is estimated by comparing other similar properties in the same vicinity recently sold or offered for sale on the open market.
>
> This approach applies the principle of substitution which affirms that a typical buyer will not pay more for a property than it will cost him to purchase a comparable substitute property.
>
> Of all appraisal approaches the Market Data Approach

> is the most frequently used, best understood and generally preferred. The important first step after a thorough inspection of the property being appraised is to obtain detailed information on sales of nearby comparables. Where necessary adjustments have to be made on the price at which each comparable was sold to account for differences in physical features as well as all other related factors as compared to the subject property.
>
> There have been some sales of properties in this area over the last several years but it is very difficult to find sales of properties which are totally comparable to the subject property. For this reason adjustments have been made to the comparable sales to account for differences from the subject property."

Sale number 1, located at Beaver Meadow, Antigonish County sold in July, 1982, for $42,000.00. The Assessor made adjustments to the sales price of this comparable property for differences in building size, lot area, plumbing, garage, basement, design and deck from the subject property and arrived at an adjusted sales price of $45,200.00.

Sale number 2, located at 72 Post Road, Antigonish County, sold in September, 1983, for $40,000.00. Adjustments to the sales price of this comparable were made for differences in location, basement, time of the sale, lot size, age, deck, plumbing, design and kitchen cabinets. The adjusted sales price of this comparable was calculated to be $45,800.00.

Sale number 3, located at Greenwold, Antigonish County, sold in October, 1980, for $30,500.00. Adjustments to the sales price of this comparable were made for differences in time of sale, location, lot size, heating, fireplace, garage, deck and design. The adjusted sales price of this comparable was calculated to be $46,000.00.

Sale number 4, also located at Greenwold, Antigonish, County, sold in April, 1983, for $42,500.00. Adjustments to the sales price of this comparable were made for differences in time of sale, location, lot size, building size, plumbing, basement, garage and design. The adjusted sales price of this comparable was calculated to be $45,200.00.

Sale number 5 located at North Grant, Antigonish County, sold in May, 1982, for $46,000.00. Adjustments to the sales price of this comparable were made for differences in building size, age, plumbing, heating, basement, garage, deck and design. The adjusted sales price of this comparable was calculated to be $51,000.00.

Sale number 6 located at Brierly Brook, Antigonish County sold in July, 1977, for $45,000.00. Adjustments were made to the sales price of this comparable for differences in time of sale, building size, age, plumbing, fireplace, basement, deck and design. The adjusted sales price of this comparable was calculated to be $49,500.00.

At page 26 of his report, Mr. MacLellan states:

> "The adjusted sale prices range from $45,200.00 to $51,000.00. Emphasis was placed on sale #3 as it was considered most comparable to the subject property. The major adjustment on this property was on the price paid in 1980. This adjustment can be substantiated by the fact that the property is presently for sale for $56,000.00.
>
> Estimate of value as of January 1, 1983 using the direct sales comparison approach is $46,000.00."

Mr. MacLellan's estimate of the market value of the subject property by the cost method was $47,600.00 consisting of $3,500.00 for land, $1,500.00 for well and septic system, $3,800.00 for the depreciated cost of the garage and $38,800.00 for the depreciated cost of the dwelling.

In estimating the land value, Mr. MacLellan selected six sales of vacant land, two of which sold in 1980, one in 1981 and three in 1982. The land area of the six properties varied from one acre to two and one-half acres and their sales price ranged from $3,000.00 to $5,000.00. Mr. MacLellan stated that it was very difficult to find sales of lots of similar size and comparability to the subject lot. He placed his greatest reliance on two sales of property located in Cloverdale,Antigonish County, which sold in July, 1980, for $3,500.00 a lot because these lots were similar in size and in distance from the Town of Antigonish as the subject property. At page 13 of his report, Mr. MacLellan stated that the land value in the area of the subject property did not substantially increase from mid 1980 to mid 1982.

In determining the cost of the dwelling and garage, Mr. MacLellan used the Nova Scotia Residential Assessment Manual as a guide. At page 27 of his report Mr. MacLellan stated:

> ESTIMATE OF REPLACEMENT COST
>
> The Department of Municipal Affairs has put together the Nova Scotia Residential Assessment Manual - This is a costing service developed by the province based on information provided by Boeckhs Valuation and Cost Systems.
>
> It was used as a guide in determining the replacement cost of the subject property. Since the figures

> obtained from this manual are based on January 1. 1976 costs, a costing index was used to bring the costs ahead to January 1, 1983.
>
> In this manual dwellings fall into six different classifications ranging from class 1A to a 6. A 1A Class dwelling is a luxury style residence, architecturally designed and supervised and containing the highest quality workmanship and materials. A class 6 dwelling is a very basic cottage type dwelling of plain design, usually self-built and of below average quality materials and workmanship.
>
> The subject property was placed in a 3A Classification. A class 3A dwelling is a simply designed home built form standared plans. It is of average quality materials and workmanship and meets or exceeds building codes.
>
> It was felt that this dwelling met the features and specifications of a 3A dwelling to some degree but was placed in a 3A - 5% class due to some cost cutting measures used in the construction of the dwelling. Although it could not be seen during the inspection the owner indicated that the exterior wall studding was at 2' intervals and that there was no strapping on the ceiling trusses. Also he indicated that the foundation wall was 8" thick instead of the normal 10" thickness for a 3A dwelling."

Mr. MacLellan placed the garage in a 3B class.

He arrived at an estimated replacement cost of the dwelling in the amount of $40,856.00 and an estimated replacement cost of the garage in the amount of $4,008.00. He applied a physical depreciation rate of 5% for both the dwelling and garage. In arriving at a rate of 5% for the dwelling, Mr. MacLellan saw no sign of above average deterioration and therefore applied the normal depreciation rate of 5% suggested by Boeckhs for a dwelling the age of the subject. After deducting an amount for physical depreciation, the assessor arrived at a depreciated replacement cost of $38,813.00 rounded to $38,800.00 for the dwelling and $3,807.00 rounded to $3,800.00 for the garage.

Adding $38,800.00, the depreciated cost of the dwelling; $3,800.00, the depreciated cost of the garage; $1,500.00, the estimated cost of the dug well and septic system and $3,500.00 the land value, the assessor arrived at $47,600.00 as the estimated market value of the subject property by the cost approach.

At page 32 of his report Mr. MacLellan states:

> "Of the two approaches to value used, the direct sales comparison approach must be considered as the most reliable, since the purpose of this appraisal was to 'Estimate the Market Value'. This approach shows what is actually happening in the market place, where as the cost approach tends to put more emphasis on the cost to reproduce the structure, then estimate the accured depreciation.
>
> The cost approach supports fairly closely the valuation arrived at using the direct sales comparison approach. Having considered all factors in this instance it is estimated that the subject property had an actual cash value as of January 1, 1983 of:
>
> FORTY SIX THOUSAND DOLLARS ($46,000.)"

The Nova Scotia Residential Assessment Manual divides dwellings into six different classifications for the purpose of determining replacement cost. The Manual describes the features and specifications for each classification to assist the assessor in matching the dwelling being assessed with the proper class for costing purposes.

Harry Daemen disagrees with the subject dwelling being placed in a 3A classification by the assessor. He submits that 3B is a more appropriate classification for the subject dwelling and he introduced as Exhibit D-7 a copy of page 17 of the Nova Scotia Residential Assessment Manual describing the features and specifications of a class 3B dwelling. Some of the features of a class 3B dwelling included in the subject property are plain design, built from stock type plans, low cost a consideration, minimal quality material and workmanship, just meets building codes and dining area part of kitchen. Some of the specifications of a class 3B dwelling included in the subject dwelling are 8" basement walls, 2½" basement floor, 2' x 8' framing, rough wood for roof sheathing and windows less than 12% of total wall area.

On cross-examination by Harry Daemen, Mr. MacLellan stated that the subject dwelling had some features and specifications of a dwelling with a 3B classification but in his opinion it more closely resembled a dwelling with a 3A classification. Mr. MacLellan stated he reduced the cost indicated for a class 3A dwelling by 5% to allow for the features of a class 3B dwelling found in the subject dwelling. Mr. MacLellan also stated that he costed the finished work in the basement with costs taken from a class 3B dwelling.

The direct sales comparison method is a preferred method to use in estimating the market value of the subject property when there is ample evidence of recent sales of properties comparable to the subject. However, it is essential that the sales chosen be comparable or reasonably comparable to the subject. The more adjustments the assessor has to make to the sales price of the property chosen as a comparable, the less reliable is the estimate of market value of the subject. In this instance, the assessor had to make at least eight adjustments (in some cases substantial) to the sales price of each sale in order to arrive at a comparable price of the subject dwelling. Some of the adjustments required included estimating replacement costs of construction for differences in building size, accounting for differences in construction design, making allowances for differences in depreciation between the comparable and the subject and estimating general increases in the sales price of property over time. Also the assessor did not adjust the sales price of the comparable to account for the inadequate water supply of the subject property. In the opinion of the Board, there were too many substantial differences requiring adjustments to the sales price of the comparable between the comparable and the subject property for the adjusted sales price of the comparables to be a reliable idication of the market value of the subject property. In the opinion of the Board the cost method provides a more reliable estimate of market value in this instance. Because the subject dwelling is newly constructed, estimating the replacement cost and the amount of depreciation is not as difficult as in some older type dwellings.

The assessor calculated the market value of the subject property by the cost method at $47,600.00. When valuing the land at $3,500.00 the assessor did not feel that the swamp area in front of the lot detracted from its market value. He also did not make any allowance for the property's inadequate water supply.

In the opinion of the Board, the assessor's estimate of $47,600.00 should be reduced as follows:

1. The land value should be reduced from $3,500.00 to $3,000.00 to take into account the swamp area in front of the lot.

2. There should be a 10% allowance for locational obsolescence because the subject property does not have a reliable water supply. The Regional Assessment Appeal Court reduced the assessed value of the subject property by $3,000.00 for this reason. In the opinion of the Board, an inadequate water supply would affect the market value of the subject property.

3. The replacement cost of the subject dwelling should be reduced from $40,856.00 to $37,353.00. In the opinion of the Board, the subject dwelling more closely resembles the features and specifications of a class 3B dwelling than a class 3A dwelling. The Board would therefore cost the subject dwelling on the basis of a class 3B dwelling but it would add 5% to include some of the features found in a class 3A dwelling.

The Board accepts the assessor's estimate of replacement cost of the garage, physical depreciation for the dwelling and garage and the cost of well and septic system.

The Board therefore determines the market value of the subject property under the cost method as follows:

Replacement cost of dwelling		$37,353.00
Physical depreciation 5%		1,868.00
		$35,485.00
Locational obsolescence 10%		$ 3,549.00
		$31,936.00
	rounded to:	$31,900.00
Replacement cost of garage		$ 3,800.00
Well and septic system		$ 1,500.00
Land		$ 3,000.00
	TOTAL	$40,200.00

The Board therefore allows the appeal and reduces the assessed value of the subject property for the 1984 assessment year to $40,200.00.

The Appellant shall be entitled to his costs in the amount of $75.00.

DATED at HALIFAX, Nova Scotia, this 30th day of January A.D., 1985.

Darryl Wilson

DARRYL. W. WILSON

Green Meadows Estates Limited v. Director of Assessment

ASSESSMENT--CHANGE OF USE TAX--FARM PROPERTY TO RESIDENTIAL--ASSESSMENT ACT,SS. 38, 40A(1),(2),(6)

This is the second hearing of an appeal from a decision of the Cape Breton Regional Assessment Appeal Court confirming the imposition of a change in use tax in the amount of $32,560.00 respecting the Green Meadows Subdivision. The Appeal Division of the Supreme Court of Nova Scotia had set aside the first decision of the Board and directed a new hearing to determine when the property ceased to be used for agricultural purposes and what its "actual cash value" was immediately after it ceased to be so used.

HELD: The appeal is allowed and the change of use tax reduced to $10,120.00. The Appellant is entitled to costs taxed on a party and party basis on the County Court scale.

The land ceased to be used for agricultural purposes in March, 1979 when sold to new purchasers. At this time the cash value of the property was $50,600.00. The change of use tax is 20% of this figure.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by GREEN MEADOWS ESTATES LIMITED, from a decision of the Regional Assessment Appeal Court Cape Breton Assessment Region.

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: GEORGE KHATTAR, Q.C., for the Appellant,

DOUGLAS J. KEEFE, LL.B., for the Director of Assessment.

DECISION

This is an appeal by Green Meadows Estates Limited, from a decision of the Regional Assessment Appeal Court, Cape Breton Assessment Region, dated September 23, 1980, whereby that Court confirmed the imposition of a Change in Use Tax of $32,560.00 pursuant to subsection 6 of Section 40A of the Assessment Act, R.S.N.S. 1967, Chapter 14, respecting property known as Green Meadows Subdivision located at Howie Centre, Cape Breton County.

The Board in a Decision and Order dated December 14, 1983, confirmed the decision of the Regional Assessment Appeal Court. The Appellant appealed the Decision and Order of December 14, 1983, to the Supreme Court of Nova Scotia, Appeal Division, and that Court in a Judgment and Order dated

June 14, 1984, allowed the appeal, set aside the Decision and Order of the Board and directed that a new hearing be held for the purpose of determining when the subject property ceased to be used for agricultural purposes and what its "actual cash value" was immediately after it ceased to be so used.

The re-hearing of the appeal took place on January 21, 1985, in the conference room of Sydney City Hall which is located on the Esplanade in the City of Sydney.

Evidence at the hearing was given by way of sworn Affidavits. Counsel for the Appellant filed an Affidavit sworn by Robert Cocco, President of the Appellant Company. Counsel for the Director filed an Affidavit sworn by Charles Hopkins, Regional Director of Assessment for the Cape Breton Assessment Region. Counsel for the Appellant and the Director agreed that the evidence presented at the previous hearing should also be considered in the current hearing.

The facts may be stated as follows:

By Deed dated March 13, 1979, Dorothy MacAulay conveyed to Robert and Luciano Cocco approximately 150 acres of land including three dwellings and two barns. This property, known as the "McConnell farm" was located at Howie Centre, Cape Breton County. In July of 1979, Robert and Luciano Cocco applied to the Municipality of the County of Cape Breton to subdivide into building lots approximately 40 acres of the McConnell farm property. Before final approval was given to the subdivision application, the approximately 40 acres of land was transferred to the Appellant, Green Meadows Estates

Limited. The application for subdivision received final approval on September 25, 1979, in the name of Green Meadows Estates Limited. It is this 40 acres of land that is the subject of this appeal regarding a change of use tax and it is hereinafter referred to as the "Green Meadows property".

At the time the Green Meadows property was deeded to the Coccos in March, 1979, the property was classified for assessment purposes as farm property. It was exempt from taxation pursuant to Section 40A(1) of the Assessment Act which reads as follows:

> "All land, excluding any buildings or structures thereon, classified as farm property shall be exempt from taxation under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property."

While the subject property was owned by Dorothy MacAulay, it was part of a farm and had been used for such agricultural purposes as the growing of hay and the grazing of livestock. Shortly after acquiring the subject property, Luciana and Robert Cocco applied to the Municipality of the County of Cape Breton for subdivision approval of the subject property. From the time the Green Meadows property was deeded to the Coccos,it was not used for agricultural purposes.

Mr. Hopkins indicated that in his opinion the market value of the subject property in March, 1979, and prior to any improvements for subdivision purposes was $50,600.00. In arriving at his estimate of market value of $50,600.00, Mr. Hopkins divided the subject property into two parts.

He valued the front part of the property which had a road frontage of 418.4 feet and a depth of 200 feet at $30.00 per front foot which indicated a value of $12,552.00. This left a balance of 38.08 acres which was valued at $1,000.00 per acre for a total of $30,080.00. By adding $12,552.00 and $38,080.00 Mr. Hopkins arrived at $50,632.00 as the market value of the subject property which he rounded to $50,600.00. Mr. Robert Cocco agrees with this valuation.

The issues to be determined are:

1. When did the Green Meadows property cease to be used for agricultural purposes? and

2. What was its "actual cash value" at the time it ceased to be so used?

The relevant portions of the Assessment Act are subsections (1), (2) and (6) of Section 40A and 38 which provide as follows:

> "(1) all land, excluding any buildings or structures thereon, classified as farm property shall be exempt from taxation under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property.
>
> (2) Farm property shall be assessed as resource property partly exempt from taxation pursuant to Section 34, but shall be separately identified and the number of acres to which this Section applies shall be set out on the roll.
>
> (6) In the event that any land, or any part of it, to which this Section applies, ceases to be land used for agricultural purposes, this Section shall cease to apply, and a change in use tax equal to twenty per centum of the value, determined by the assessor pursuant to Section 38, of the land or part thereof to which this Section ceases to apply, shall become due and payable to the Town or municipality in which the land is situate.

> 38. All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

In the opinion of the Board, the subject land ceased to be used for agricultural purposes in March, 1979, when Luciano and Robert Cocco purchased it from Dorothy MacAulay. Up to that point, the subject property had been used for agricultural purposes. Once the subject property was acquired by the Coccos it was not used for agricultural purposes.

Based on the evidence of Charles Hopkins, the Regional Director of Assessment which the Board accepts and with the agreement of Robert Cocco, the Board determines the actual cash value of the subject property as of March, 1979, to be $50,600.00. The Board therefore allows the appeal and determines the change of use tax to be $10,120.00 (20% of $50,600.00).

The Appellant shall be entitled to its costs on a party and party basis on the County Court scale to be taxed by Michael Whalley, Q.C.

DATED at HALFIAX, Nova Scotia, this 14th day of February, A.D., 1985.

Daryl W. Wilson
DARRYL W. WILSON.

Member,
NOVA SCOTIA MUNICIPAL BOARD.

Myer v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--COST APPROACH--MARKET DATA APPROACH--PRIOR OFFER TO PURCHASE--FUNCTIONAL OBSOLESCENCE

This is an appeal from a decision of the Halifax City Regional Assessment Appeal Court confirming the 1984 assessment of the Appellant's residential property in the amount of $43,800.00. The subject property was originally assessed for 1984 at $57,100.00. When this was appealed, the Director of Assessment reviewed the assessment and reduced it to $43,800.00. On this hearing, the assessor increased his valuation to $47,000.00. The property had been listed for sale in 1979 for $51,000.00, later reduced to $44,900.00. The only offer received was for $35,000.00, which was not acceptable to the Appellant.

HELD: The appeal is allowed and the 1984 assessment is reduced to $40,000.00. The Appellant is entitled to costs in the amount of $75.00.

The offer to purchase of $35,000.00 in 1980 is not conclusive evidence of market value. The Board accepts the evidence of the assessor as to reproduction costs, land value and rate for physical depreciation, but does not agree with his calculations on the cost approach. The assessor has not accounted for functional obsolescence in the subject building.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967 c. 14 as amended;

- and -

IN THE MATTER OF: An Appeal by Janina Myer from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: BRIAN MYER, son of the Appellant for the Appellant without counsel;

MARIAN F.H. TYSON, LL.B., for the Director of Assessment

DECISION

This is an appeal by Janina Myer from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region dated June 4, 1984, by which the 1984 assessment of the Appellant's residential property located at 59 Coronation Avenue, Halifax, was confirmed in the amount of $43,800.00.

The Appellant's Notice of Appeal is dated June 24, 1984 and it was received by the Board on June 27, 1984.

The Notice of Appeal reads as follows:

> " Take notice that I am not satisfied with the decision rendered by the assessment appeal court on 4 June 1984.
>
> I wish to appeal this decision to the Nova Scotia Municipal Board on the grounds that this decision was based on erroneous finding of fact without considering the evidence before the court.
>
> My sons Brian Myer and Dennis Myer will represent me in the appeal."

There was no objection to the Board's jurisdiction to hear the appeal and the Board assumed jurisdiction to hear the merits of the appeal.

The subject property was originally assessed for the 1984 assessment year at $57,100.00. When the Appellant filed a Notice of Appeal, the Director reviewed the assessment pursuant to Section 84 of the Assessment Act, amended the 1984 assessment by reducing it to $43,800.00. The Appellant objected to the amended assessment and filed a Notice of Appeal with the Regional Assessment Appeal Court which confirmed the amended assessment at $43,800.00.

The subject property consists of a lot of land (50' x 100') improved with a detached two-storey building containing 805 sq.ft. per floor and attached one-storey porch containing 48 sq.ft. and a deck containing 66 sq.ft. There is a basement under 3/4 of the building. The basement has a dirt floor and a rock and mortar finish. You cannot stand up in the basement. There is no access to the basement from the interior of the house. The building was constructed in stages. The first floor and basement were built in 1942. It was designed and used solely as a store. Subsequently a second floor was added and it has been used as a residence. At the time the 1984 assessment was prepared, the first floor was not being used for any purpose. The present zoning in the area is R-4 which precludes the property being used as a store. Since the store has not operated for several years, it has lost its non-conforming use status. The Appellant resides in an apartment on the second floor. There is no interior access to the second floor from the first floor. Access to the second floor apartment is by way of an outside stairway. The first floor is not finished to accommodate a residential use.

Witnesses during the hearing were Julia Hale, on behalf of the Appellant and G.R. Graham, C.R.A., on behalf of the Director of Assessment.

Julia Hale is a licensed Real Estate sales person with seven years experience selling real estate, all in the Halifax-Metropolitan area. At the time of the hearing, she was a sales agent for Royal Trust.

In 1979, she was a Real Estate Agent for Canada Permanent Trust. On November 1, 1979, the Appellant signed a multiple listing agreement giving Canada Permanent Trust authority to sell the subject property for $51,000.00. Mrs. Hale was the listing agent. The Multiple Listing Agreement expired on February 1, 1980. It was renewed on February 4, 1980 and the renewal expired on May 4, 1980. The renewed Multiple Listing Agreement indicated the asking price was reduced to $44,900.00. Mrs. Hale stated that during the period that the property was listed, the only offer received was an offer for $35,000.00 which was not acceptable to the Appellant. At the time the property was listed for sale in 1979 - 1980, the store which occupied the first floor was in operation.

According to Mrs. Hale, most people who viewed the property were not satisfied with its condition. She stated that most of the people were of the opinion that the building would have to be torn down. On one occasion, a prospective purchaser viewed the property accompanied by a building contractor who discouraged him from placing an offer on the property because of its poor condition.

Mrs. Hale described the basement as a cellar or a crawl area. In her opinion, it would have no value except for storage and a place to put the furnace and oil tank. She stated that the floors in the room at the back of the building where there is no foundation are slanted. She also stated that the walls in the apartment are dry wall but the taping shows.

Mrs. Hale could not state precisely what the market value of the subject property would be but she thought that $35,000.00 would likely be the absolute maximum market value of the property. In her opinion, the property had some commercial value in 1980 which it does not now have. She also said that it would be difficult to sell the subject property as a residential property because of its poor condition. She thought someone might be interested in the property for its land value or else an investor might construct rental apartments.

Ray Graham is employed by the Province of Nova Scotia as an assessor in the Halifax City Assessment Region. He has five years experience as an assessor and prior to that, seven years experience as a Real Estate salesman in the Halifax Metropolitan area. He prepared an assessment report relating to the property filed as Exhibit M-3.

Mr. Graham did not do the initial 1984 assessment on the subject property which was set at $57,100.00. However, he appeared on behalf of the Director of Assessment at the Regional

Assessment Appeal Court hearing. At that time, his opinion of the market value of the subject property was $43,800.00 and that value was confirmed by the Regional Assessment Appeal Court. At the present hearing, Mr. Graham's opinion of the market value of the subject property is $47,000.00. Mr. Graham states that he changed his opinion on market value because at the Regional Assessment Appeal Court hearing, he allowed too much for depreciation. He changed his opinion on depreciation because he had more time to prepare for the current hearing than he had to prepare for the Regional Assessment Appeal Court hearing.

Mr. Graham estimated the market value of the subject property using a direct sales comparison method and a cost method. His estimates of market value were $48,000.00 by the direct sales comparison method and $47,000.00 by the cost method.

At Page 14 of his report, Mr. Graham states:

> " In the Market Data Approach, the Market Value of a given property is estimated by comparison with similar properties for which Market Data is available. The Principle of Substitution is applied, i.e., when property is replaceable, typical buyers will not purchase it at a higher price than those paid for similar properties with comparable locations, characteristics, and ability to provide satisfaction to the owner.
>
> There are several recent sales of properties in the immediate neighbourhood for which reliable data is available. The houses selected are two storey houses that sold recently. However, due to no interior finish and a partial basement in subject, this approach, although giving a good indication of value, is not considered as reliable as the Cost Approach and will not be given as much weight in the final estimate of value."

Mr. Graham selected three property sales to compare to the subject property. In the opinion of the Board these properties are so unlike the subject property that they cannot be considered comparable to the subject property. By adjusting the sales price of the comparables for differences found in the subject, the assessor is essentially following the cost approach because he accounts for the differences in terms of costs taken from the various costing manuals.

Although Mr. Graham did not give much weight to the estimate of market value by the direct sales comparison method, he did state that it had helped to confirm the reliability of his estimate by the cost method.

Mr. Graham's estimate of the market value of the subject property by the cost method was $47,000.00 consisting of $22,500.00 for land and $24,500.00 for the depreciated cost of the building.

At Page 10 of his report, Mr. Graham describes how he arrived at his estimate of land value.

> " To arrive at the land value, the abstract method was used. This method is based on the assumption that the total value of the property is the sum of the value of the building and the value of the site. Sales of properties in the neighbourhood were used in this analysis. The reproduction cost of the building minus depreciation was deducted from the selling price and the remaining value was considered to be land value. Land value was then converted to a front foot value for the neighbourhood.
>
> The front foot value, as determined by the analysis, used on all properties in the area was $450 per front foot. The standard lot in this area is 50 x 100. The subject property is standard, therefore, no adjustment was necessary. The calculation of market value of subject lot is as follows:
>
> 50' x $450 = $22,500
> Indicated land value is:
>
> Twenty Two Thousand, Five Hundred Dollars ($22,500)."

In determining the value of the subject building, Mr. Graham used costs found in the Nova Scotia Residential Assessment Manual. He describes this method of valuation at Pg. 12 of his report as follows:

> " This method involves the retrieval of square metre (square foot) costs from various manuals produced by professional cost services available, e.q. The Dow Cost Calculator, Boeckh Building Valuation Manual, The Marshall and Stevens Valuation Quarterly, etc. Basic rates are provided and multipliers are then applied to adjust for the time factor, locational differences, etc. Updated multipliers are provided periodically. This method of costing is quite widely used with the accuracy being dependent on selecting the most applicable bench mark, selecting the correct multiplier and making proper adjustments for basic differences that may apply.
>
> The Cost Services Method has been selected for use in this appraisal, and is based on costs as shown in the Nova Scotia Assessment Manual."

Mr. Graham placed the subject building in a 4A Classification. The features of a Class 4A dwelling described in the Residential Assessment Manual include "usually plain shaped design, built from stock type plans, little or no ornamentation, cost primary consideration".

By referring to the Nova Scotia Residential Assessment Manual for the Halifax Area, Mr. Graham arrived at an estimated reproduction cost of the building in the amount of $54,751.00. He reduced these costs to account for the deficiencies in the construction of the basement, the lack of finish and partitions on the first floor and the lack of an interior stairway to the second floor. After adjustments, he arrived at an estimated reproduction cost of the subject building in the amount of $40,824.00.

Mr. Graham stated that his observation of the building indicated "a fair amount of physical depreciation had taken place". He applied a physical depreciation rate of 40% although the depreciation table in the Residential Assessment Manual indicated the normal depreciation for a building the age of the subject would be 35%.

Mr. Graham did not allow any reduction in value for locational obsolescence.

At Page 7 of his Appraisal Report under the heading of "Functional Obsolescence", Mr. Graham states:

> " Functional Obsolescence is a loss in value to a structure because of an inability of the structure to perform its proper function efficiently. It is inherent in the property and is a loss from cost new as at the date of the appraisal caused by overcapacity, inadequacy, unattractive style, poor or inefficient design. It is usually a reflection of the fact that the structure is outmoded or inefficient, judged by current market standards or performance or acceptability.
>
> The subject property was built and used as a store on the first floor and a residence on the second floor. However, the basic structure is the same as any two storey, family home. An adjustment was made for the lack of finish on the first level, which removed any Functional Depreciation that may have existed due to the change from a store to living accommodations."

After deducting $16,330.00,(40% of $40,824) for physical depreciation, Mr. Graham arrived at a depreciated reproduction cost of $24,494.00 for the subject building. Adding the land value of $22,500.00 to the depreciated reproduction cost of the building of $24,494.00, Mr. Graham arrived at $46,994.00 as the estimated market value of the subject property by the cost approach which he rounded to $47,000.00.

At Page 21 of his appraisal report, Mr. Graham stated how he arrived at his final opinion of market value for the subject property.

> " The following estimates of value are indicated:
>
> | | |
> |---|---|
> | Cost Approach | $47,000 |
> | Market Data Approach | $48,000 |
> | Income Approach | N/A |
>
> The Cost Approach is often the only approach for unusual properties for which no market data is available. This property is not one of a kind, but it is a little unusual in that the main floor has no interior finish. By using the rates for average living area from the N.S. Assessment Manual the cost of this deficiency was accurately estimated and allowed for in the Cost Approach. It is felt that since this same manual was used in assessing all other residential properties in the City of Halifax, that the estimate of value by this approach is accurate.
>
> The Market Data approach reflects the actions of buyers and sellers in the area. It is a very reliable indicator of market value if recent sales of comparable properties are available. In this case, recent sales were available, but heavy adjustments had to be made due to the fact that subject property has a poor basement and no finish on the main floor. It does, however, support my estimate of value by the Cost Approach. Therefore, my final estimate of value is:
>
> FORTY SEVEN THOUSAND DOLLARS ($47,000.)"

Brian Myer, on behalf of the Appellant submits that the Board should reduce the assessment to "some reasonable value below $35,000.00." He points out that the property had been listed for sale on three occasions and the only offer received was in 1980 for $35,000.00. Mr. Myer submits that since the time that offer was received, the property has lost its commercial value and therefore it is less valuable today than in 1980.

Counsel for the Director submits that the Appellant did not present any evidence of market value and the only evidence available on market value was the evidence of the assessor. Counsel for the Director also submits that the asking price by the Appellant at the time of each listing was higher than the offer received and that the offer was not acceptable to the Appellant. She also submits that Real Estate prices have increased since the offer was received in 1980.

In the opinion of the Board, an offer of $35,000.00 for the subject property in 1980 which was unacceptable to the Vendor is not conclusive evidence of the market value of the subject property on January 1, 1983, the effective date for valuing the subject property for the 1984 assessment year. However, the evidence presented on behalf of the Appellant does suggest that the subject property is a difficult property to sell. This may be due in part to its poor condition and in part to an excessive asking price by the Appellant.

The Board accepts the evidence of the assessor with respect to reproduction costs, land value and rate for physical depreciation. However, the Board does not agree with the assessor's calculations on the cost approach.

The assessor costed the subject building as if it was a Class 4A two storey dwelling. His costs included the cost of partitions and finish on the first floor and a stairway leading to the second floor. He then adjusted the cost for a two storey Class 4A dwelling to exclude the cost of partitions and finish on the first floor and the stairway leading to the second floor because the subject building did not have these features. The assessor estimated the amount of functional obsolescence in the subject building to be the cost to install partitions and finish on the first floor and a stairway to the second floor. He accounted for the loss in value due to functional obsolescence by reducing the reproduction cost of the subject building by the cost of these items.

The Board disagrees with the assessor that he has accounted for functional obsolescence in the subject building. By removing the cost of partitions, interior finish and stairs, the assessor has only costed the building as it presently exists. In order to allow for functional obsolescence, it is necessary to reduce the reproduction costs of the building excluding partitions, finish and stairs by the cost to install these items in the subject building.

The cost to install interior finish, partitions and stairs was estimated by the assessor to be $11,431.00 based on costs taken from the Residential Assessment Manual.

The Board determines the market value of the subject property by the cost approach as follows:

Reproduction Costs of Existing Building	-	$40,824.00
Functional Obsolescence	-	11,431.00
		$29,393.00
Physical Depreciation 40%		11,757.00
Building Value	-	$17,636.00
Land Value	-	22,500.00
Property Value	-	40,136.00

Rounded to $40,000.00

The Board therefore allows the appeal and reduces the assessed value of the Appellant's property located at 59 Coronation Ave., Halifax, Nova Scotia, to $40,000.00 for the 1984 assessment year.

The Appellant shall be entitled to her costs in the amount of $75.00.

DATED at HALIFAX, Nova Scotia this 15th day of February, A.D., 1985.

Darryl W. Wilson

DARRYL W. WILSON

Jurcina v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--COST METHOD--DIRECT SALES COMPARISON METHOD

This is an appeal from a decision of the Cape Breton Regional Assessment Appeal Court confirming the Appellant's 1984 residential assessment for $53,000.00. Evidence was given by a Senior Assessor that he estimated the market value by the cost method to be $49,800.00 and by the direct sales comparison method to be $55,700.00. He put more weight on the cost method because the dwelling was newly constructed in 1983.

HELD: The appeal is allowed. There is no award as to costs.

The Appellant's agree with the Senior Assessor's estimate of $49,800.00. The Board accepts this evidence from an experienced assessor familiar with the subject property, based on an acceptable method and data, and determines the market value to be $49,800.00.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, c. 14, as amended;

- and

IN THE MATTER OF: An Appeal by Francis and Catherine Jurcina, from a decision of the Regional Assessment Appeal Court, Cape Breton Assessment Region;

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: CHARLES BRODERICK, LL.B., for the Appellant;

DOUGLAS KEEFE, LL.B., for the Director of Assessment.

DECISION

This is an appeal by Francis and Catherine Jurcina from a decision of the Regional Assessment Appeal Court, Cape Breton Assessment Region, made August 17, 1984, whereby that Court confirmed the assessment of the Appellants' residential property consisting of land and dwelling located at civic number 3043 Poplar Lane, New Waterford, Cape Breton County for the 1984 assessment year in the amount of $53,000.00. The Appellants' Notice of Appeal is dated August 30, 1984, and was received by the Board on September 10, 1984. The Appellants state that the market value of the subject property should be less than $53,000.00 because there is a "water main transversing the property".

The only person to give evidence during the hearing was Edward McInnis. Mr. McInnis is employed by the Province of Nova Scotia as a Senior Assessor in the Cape Breton Assessment Region. He has been an Assessor for 9 years and a Senior Assessor for four of those nine years. Part of Mr. McInnis' duties as a Senior Assessor is the supervision of other assessors. He prepared an assessment report with respect to the subject property which was filed as Exhibit J-3.

The initial 1984 assessment was prepared by Gail Degaust who has been ill since the middle of December, 1984, and could not appear at the hearing of the appeal.

The subject property consists of a lot of land (86' x 100') improved with a single family home (24' x 42').

Mr. McInnis estimated the market value of the subject property by the cost method to be $49,800.00 and by the direct sales comparison method to be $55,700.00. However, he stated that he put more weight in his estimate of market value by the cost method because the dwelling was newly constructed in 1983 and it was not too difficult to estimate the reproduction cost and depreciation of the subject building.

In estimating the market value of the subject property by the cost method, Mr. McInnis estimated the land value to be $4,400.00 and the depreciated building value to be $45,400.00.

In estimating the land value Mr. McInnis reviewed twelve sales of vacant residential land in the immediate neighbourhood. Adjustments were made to the comparable sales to standardize the depth of the lot with the subject property. From his review, he was able to determine the front foot value range from $40.00 to $90.00 for the lots which sold with most of the sales in the $58.00 to $68.00 per front foot range. Based on this review he applied a front foot value of $60.00 to the subject property. He also made an adjustment of a 50% decrease in the value of the land which was affected by the waterline easement.

In estimating the value of the dwelling he used the Nova Scotia Residential Assessment Manual to calculate the reproduction cost. He applied a 5% physical depreciation rate to the reproduction cost based on his observations of the dwelling and a 15% locational obsolescence factor which he stated was applied to all dwellings in the immediate vicinity of the subject property.

The Appellants agree with Mr. McInnis' estimate of $49,800.00 as the market value of their property for the 1984 assessment year.

The Board accepts the evidence of Mr. McInnis. He is an experienced assessor familiar with the subject property and he has prepared an appraisal report based on an acceptable valuation method supported by market data on land value and building costs.

The Board determines the market value of the subject property for the 1984 assessment year to be $49,800.00.

Both parties stated that they were not seeking costs. The Board makes no award as to costs.

DATED at HALIFAX, Nova Scotia, this 15th day of February, A.D., 1985.

Darryl W. Wilson

DARRYL W. WILSON

Member,
NOVA SCOTIA MUNICIPAL BOARD.

Robicheau v. Director of Assessment

ASSESSMENT--RESIDENTIAL AND FOREST RESOURCE--JURISDICTION OF BOARD--OWNERSHIP OF LAND

This is an appeal from a decision of the Annapolis-Digby Regional Assessment Appeal Court confirming the 1984 assessment of the Appellant's residential property at $23,000.00 and 10 acres of forest resource property at $1,000.00. The Appellant was concerned as to the ownership of certain land which had not been assessed to him.

HELD: The appeal is dismissed without costs.

The Board does not have jurisdiction to determine whether the Appellant is the owner of the subject property. This is a matter within the jurisdiction of the Supreme Court of Nova Scotia. The subject property is not part of the Appellant's 1984 residential or forest resource assessments and was assessed to another person. The Appellant is not complaining about being omitted from the 1984 assessment roll for that property.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, c. 14, as amended;

- and

IN THE MATTER OF: An Appeal by Lloyd Robicheau, from a decision of the Regional Assessment Appeal Court, Annapolis-Digby Assessment Region;

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: LLOYD ROBICHEAU on his own behalf without counsel;

MARIAN F.H. TYSON, LL.B., for the Director of Assessment.

DECISION

This is an appeal by Lloyd Robicheau from a decision of the Regional Assessment Appeal Court, Annapolis-Digby Assessment Region made June 25, 1984, whereby that Court confirmed the assessment relating to the Appellant's residential property in the amount of $23,000.00 and the assessment relating to 10 acres of the Appellant's forest resource property in the amount of $1,000.00 for the 1984 assessment year. Both of the Appellant's properties are located at Marshalltown in the County of Digby.

The Appellant's Notice of Appeal is dated July 17, 1984, and it was received by the Board on July 19, 1984. The Notice of Appeal filed as Exhibit R-1 reads as follows:

> "Dear Sirs,
>
> I am writing to have the decision made by the appeal court against the following property:

> Property number 23-02-2180-I
> Assessment appeal no. 8423010III
> Assessment Region Annapolis-Digby
>
> and in the name of Lloyd C. Robicheau, for the following reason,
>
> 1. There is a parcel of land that was suppose to have been sold for tax sale while the previous owner had the property although it was to have been sold in another name besides the owner.
>
> When we had our deed made out there was no indacation of this parcel of land taken off the new deeds.
>
> So we want to find out if this is what happened, and if this can be done.
>
> We will wait to hear an appeal date from this appeal."

The Board requested clarification of the Appellant's grounds of appeal. In a letter dated July 24, 1984, filed as Exhibit R-3, the Appellant stated:

> "This is to acknowledge your reply to my letter. The reason I am appealing the decision of the Regional Board is because we were told to appeal the taxes in order to find if we own a certain piece of land or not.
>
> About a year ago we were going to sell a piece of property when we were told we couldn't as it had been sold for tax sale.
>
> After making inquiries we found out that part of this property had been sold for taxe sale, under the name of Annie Thomas. So we had the Registry office checked and found no deeds in the name of Annie Thomas from the previous owner James Robicheau. Annie Thomas was deceased at the time of the sale. And to our knowledge James Robicheau had never deeded any land to Mrs. Thomas.
>
> At his death we aquired the property from his Wife. At which time we had a lawyer make out the deeds, this piece of property was deeded to us.
>
> We would like to know if this is our property or not, we are satisfied with our assessment at the present time. But we would like to know about this

> one piece of land. If you can help me out with this without an appeal I would be satisfied.
> My phone number is 245-2829.
> My address is. Lloyd C. Robicheau
> R.R. #2 Marshalltown
> Digby Co., N.S.
> B0V 1A0"

In response to the Appellant's letter of July 24, 1984, the Board by letter dated August 1, 1984, indicated that it was reluctant to set the matter down for hearing because there did not appear to be an issue for the Board to deal with although the Board was prepared to proceed if the Appellant thought the Board had some jurisdiction to deal with the matter in question.

The matter was eventually set down for hearing at the Appellant's request.

Marguerite Wood gave evidence on behalf of the Appellant. She said that James Robicheau, the Appellant's father, owned a large parcel of land which was located in Marshalltown, Digby County. Paragraph's following the metes and bounds description in the Deed by which James Robicheau acquired his property indicated that the total number of acres being conveyed was approximately 15 acres. When James Robicheau died, the Appellant acquired title to the aforementioned property by Deed dated September 14, 1976. Subsequently, the Appellant sold three parcels of land. In 1983, the Appellant attempted to sell a small parcel of land (approximately 3/10ths of an acre) located at the northeast corner of his property, hereinafter referred to as the subject property. The description in the deed by which he acquired title to his father's property included the subject property. He was advised by the Regional office of the Annapolis-Digby Assessment Region that the subject property had been sold at a tax sale in 1974 and that the assessed owner at that time was Annie Thomas. Ms. Wood said that a title search of the records at the Registry of Deeds Office for Digby County did not reveal any deed indicating James Robicheau conveyed the subject property to Annie Thomas. She also stated that neither James Robicheau nor his family, including the Appellant, were notified of the tax sale in 1974.

Ms. Wood stated that the ombudsman's office advised the Appellant to appeal his assessment in order to determine whether he owned the subject land. She further stated that if the Appellant does not own the subject land he wants a rebate in the taxes he has paid on this parcel of land since 1974. She stated that the Appellant was satisfied with his residential assessment and the classification and valuation of the forest resource assessment.

Mr. Murray Harris is the Regional Director of Assessment for the Annapolis-Digby Assessment Region. He stated that a search of the assessment records indicated the subject property was assessed to Annie Thomas from 1968 to 1974. The subject property was sold at a tax sale in 1974 to Melva and Rosemond Harold. The property has been assessed to the Harolds from 1976 to 1984.

Mr. Harris stated that when he first started to work as an assessor with the local Municipal Assessment Office in 1968, he was given the job of checking on the ownership of properties with tax arrears for the purpose of preparing for a tax sale under the Assessment Act. Mr. Harris stated that he had a conversation with James Robicheau with respect to the subject property. According to Mr. Harris, Mr. James Robicheau stated that he gave a deed to the subject property to Annie Thomas. Mr. Harris made a record of this conversation which he included in the assessment records relating to the tax sale of the property in 1974. A copy of this undated notation by Mr. Harris was filed as part of Exhibit R-4. The record includes a rough drawing of the subject property and the following notation in the handwriting of Mr. Harris:

> "(Info from James E. Robicheau)
> He gave a deed to Annie L. Thomas".

Mr. Harris stated that when he was preparing his report for the current hearing he checked to see if the subject land was assessed to both Mr. Harold and the Appellant. To assist in determining the boundaries and size of the Appellant's land, Mr. Harris gathered together two land surveys relating to land in the area of the subject property, a highway strip map, aerial photos, the deed with description of the original parcel of land acquired by James Robicheau and the deeds with descriptions of all land conveyed out of the original parcel of land. Mr. Harris stated that he gave all this information to a draftsman in his office and asked him to determine the present boundary lines of the Appellant's property and the number of acres within those boundary lines. Mr. Harris stated that his draftsman reviewed the information and concluded that the Appellant presently owns 17.2 acres of land excluding the subject land. Since the Appellant is assessed for only 10.6 acres, Mr. Harris concluded that the Appellant was not assessed for the subject land.

Mr. Harris said that the Appellant should be assessed for an additional 6.6 acres of forest resource land. Mr. Harris points out that this additional 6.6. acres of land would be valued at $100.00 per acre but it would be exempt from taxation pursuant to Section 40B(1) of the Assessment Act which reads as follows:

> "All forest property bona fide used or intended to be used for forestry purposes shall be exempt from taxation under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property, except as provided in this Section."

According to Mr. Harris a special tax of 25¢ per acre is levied pursuant to Section 40B(3) which would increase the Appellant's tax bill by $1.75. Section 40B(3) reads as follows:

> "In lieu of all rates and taxes of the town or municipality an owner of forest property to which this Section applies shall annually pay a tax, to be known as a forest property tax, equal to twenty-five cents per acre for all of his forest property to which this Section applies if his forest property is classified as resource property, and forty cents per acre if his forest property is classified as commercial property, and where an area, village or commission rate is levied for fire protection, the owner shall be liable to an additional annual tax not exceeding one cent per acre as the authority levying the area, village or commission rate shall determine."

The Appellant disputes the accuracy of the assessor's calculation of the number of acres of forest property he owns.

Section 77(1) and (2) of the Assessment Act read as follows:

> "(1) Any person complaining that he has been wrongfully inserted in our omitted from the assessment roll or that his property has been undervalued or overvalued by the assessor or that his property has been wrongfully classified may give notice in writing to the recorder that he appeals from the insertion, omission, valuation or classification and shall give a name and address where notices may be served upon him by the recorder.
>
> Notice of Appeal by Ratepayer or Clerk
>
> (2) Any ratepayer or the clerk of any town or municipality complaining that a person has been wrongfully inserted in or omitted from the roll or that property of a person has been undervalued or overvalued by the assessor or that property of a person has been wrongfully classified may give notice in writing to that person and to the recorder that he appeals from such insertion, omission, valuation or classification and shall give a name and address where notices may be served upon him by the recorder or the respondent."

Section 99 of the Assessment Act reads as follows:

> "Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

At issue is the ownership of a parcel of land located at the northeastern corner of the Appellant's property on the Marshalltown Road, Digby County and whether the Appellant has been wrongfully inserted in the assessment roll or omitted from the assessment roll with respect to the subject property.

The Board raised the issue of whether it had jurisdiction to determine the matter appealed by the Appellant.

With respect to whether the Appellant is the owner of the subject property, in the opinion of the Board, that is a matter within the jurisdiction of the Supreme Court of Nova Scotia and not a matter that the Board can deal with and make a determination about on an appeal from a decision of the Regional Assessment Appeal Court.

With respect to whether the Appellant has been wrongfully inserted in the assessment roll for the subject property for the 1984 assessment year, the evidence of Mr. Harris indicates that the subject property was assessed to Mr. and Mrs. Harold for the 1984 assessment year and that the Appellant has not been assessed for the subject property. The subject property is not part of the Appellant's 1984 residential or forest resource assessments.

The Appellant is not complaining that he has been wrongfully omitted from the 1984 assessment roll or that Mr. and Mrs. Harold have been wrongfully inserted in the 1984 assessment roll with respect to the subject property.

The essence of the matter appealed is the ownership of the subject property and that is a matter outside the jurisdiction of this Board to determine on appeal from a decision of the Regional Assessment Appeal Court.

The appeal is therefore dismissed.

There will be no award as to costs.

DATED at HALIFAX, Nova Scotia, this 19th day of February, A.D., 1985.

DARRYL W. WILSON

Member,
NOVA SCOTIA MUNICIPAL BOARD.

Director of Assessment v. D. Porter and Son Limited

ASSESSMENT--COMMERCIAL--POWER OF BOARD TO ORDER DIRECTOR OF ASSESSMENT TO PROVIDE INFORMATION--MARKET VALUE--COST METHOD--INDEPENDENCE AND RELIABILITY OF WITNESSES--UNIFORMITY--EVIDENCE OF OTHER PROPERTIES--ASSESSMENT ACT, SS. 38, 77(2)

This is an appeal by the Director of Assessment from a decision of the Pictou Regional Assessment Appeal Court which reduced the 1982 commercial assessment of the property of D. Porter and Son Ltd. in Stellarton from $600,000.00 to $380,000.00.

HELD: The appeal is allowed and the Porter property is valued for assessment purposes for 1982 at $593,200.00. The business occupancy assessment is one-half of the amount, or $296,600.00. The Appellant is entitled to its costs to be taxed on a party and party basis on the County Court scale.

Prior to the hearing, Porter requested the Board to make an Order directing the Director of Assessment to release information on 13 other large commercial properties. The Board responded that it was not satisfied that it had authority to issue the Order requested or that it would be appropriate to do so. Subsequently the Prothonotary's office issued two subpoenas to assessors directing them to bring information on these properties. At the outset of the hearing Porter asked the Board to order the Director to release immediately the material brought by means of subpoena so that it could be examined. The Board decided not to issue this Order but would rule from time to time during the hearing on the admissibility of any particular piece of evidence.

Section 38 of the Assessment Act states that all property shall be assessed at market value. Here the parties agree that the most appropriate method to use to determine this is the cost method. There is disagreement on the reproduction cost and physical depreciation of four of the nine buildings and the appropriate amount of functional and economic obsolescence. However, the evidence on behalf of Porter was of little assistance to the Board. The Board does not attribute any weight to the evidence of the appraiser on behalf of Porter and did not find that the President of Porter exhibited the independence and objectivity necessary to enable the Board to rely upon his testimony. The best evidence of market value of the subject property was the evidence on behalf of the Director of Assessment.

Porter also argued that the property was not assessed in accordance with the uniformity provisions in s.38 in that the Porter property was assessed at 100% of market value while thirteen other large commercial properties in Stellarton had a higher market value than the assessed value. The Board did not allow the introduction of evidence relating to the assessment of these thirteen other properties as it was not relevant to the issue before the Board, namely, the assessed value of the subject property. If Porter felt other properties were under-assessed, it could have appealed those assessments. There was no evidence to show that "the general level of assessment" of property in the Town was lower in relation to market value than was Porter's assessment. The Board is satisfied that all property in the Town was assessed for 1982 at the 1981 assessed value, which was the year of the last general reassessment of all properties in the Town, and that this was based on 100% of market value as of Jan.1, 1980.

NOTE:

D. Porter and Son Ltd. appealed the Board's decision and the Supreme Court of Nova Scotia Appeal Division set aside the Board's Order based on the Board's error in law in refusing (on the basis it was not relevant) the request of the property owner that the assessor produce assessment records respecting 13 other commercial properties in the Town in accordance with a subpoena issued by the Prothonotary and by refusing to permit the property owner to introduce this information as evidence at the hearing.

The Court held this evidence was both relevant and admissible and remitted the matter to the Board for a new inquiry (See S.C.A. File No. 01443).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14, as amended;

- and

IN THE MATTER OF: An Appeal by the Director of Assessment from a decision of the Regional Assessment Appeal Court, Pictou Assessment Region respecting the commercial property of D. Porter and Son Limited in the Town of Stellarton, Pictou County.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman,
DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: MARIAN F.H. TYSON, LL.B., for the Director of Assessment,

HARRY R.G. MUNROE, LL.B., and E. ANTHONY ROSS, M. Eng., P. Eng., LL.B., for D. Porter & Son Ltd.

DECISION

By Notice of Appeal which was not dated, received by the Board on May 30, 1983, the Appellant, the Director of Assessment, (hereinafter referred to as Director) appealed the decision of the Regional Assessment Appeal Court, Pictou Assessment Region, which was undated, but filed with the Recorder of the Regional Assessment Appeal Court on May 16, 1983, which decision reduced the 1982 commercial assessment of the property of D. Porter & Son Limited., (hereinafter referred to as Porter) located at Foord Street, in the Town of Stellarton, Nova Scotia, from $600,000.00 to $380,000.00.

The appeal was heard by the Board on November 15, 1983, January 17th, 18th and 19th, 1984, and March 19th and 20th, 1984. Briefs were filed by Counsel subsequent to the hearing with the last brief being received by the Board on June 7, 1984.

Prior to the commencement of the hearing, Counsel for Porter requested certain information regarding the assessments of commercial property in the Town of Stellarton from the Director of Assessment but was advised by Counsel for the Director of Assessment that the information requested would not be released. In a letter dated October 25, 1983, Counsel for Porter made application to the Board for an Order directing the Director of Assessment to release the information requested. The letter from Counsel for Porter reads as follows:

> "As Solicitors for D. Porter & Son Limited, we requested certain information regarding the assessments of commercial properties in the Town of Stellarton, County of Pictou, Province of Nova Scotia, from the Department of the Attorney General, which is acting for the Director of Assessment. By way of letter dated October 13, 1983, Marian Tyson replied to this request by refusing to permit us access to those details.
>
> This evidence is necessary for the Appellant to successfully defend the Decision of the Regional Assessment Appeal Court and its position. D. Porter & Son Limited therefore make application to the Municipal Board for an Order:
>
> 1. requiring the Director of Assessment to provide to their solicitor details of the assessments made on other commercial properties situate in the Town of Stellarton, and in particular on the following properties
>
> (a) Atlantic Motors, Blue Acres, Stellarton;
> (b) Bank of Nova Scotia, Foord Street, Stellarton;
> (c) Bridge Street Motors, Blue Acres,

> Stellarton;
> (d) Canada Envelope, Stellarton Industrial Park;
> (e) Coca Cola building, Stellarton Industrial Park;
> (f) Fire Hall, Town of Stellarton;
> (g) Foord Construction building, Blue Acres, Stellarton;
> (h) Foord Theatre, Foord Street, Stellarton;
> (i) Sears Distribution Warehouse, Stellarton Industrial Park;
> (j) Sobeys Distribution Centre, North Foord Street, Stellarton;
> (k) Sobeys Supermarket and Royal Bank, Foord Street, Stellarton;
> (l) Sumner Company, Bridge Street, Stellarton;
> (m) Wearwell Garments, Stellarton Industrial Park;
>
> 2. requiring the Director of Assessment or his Solicitor to provide to the applicant the tapes used to record the proceedings before the Regional Assessment Appeal Court or a full explanation as to the whereabouts of the said tapes.
>
> While we appreciate that it would be possible to Subpoena this evidence at the time of the Hearing, its sheer volume would make it quite impossible to synthesize this simultaneously at the Hearing."

The Board replied to this request by letter dated November 2, 1983, which reads as follows:

> "This will acknowledge receipt of your letter dated October 25, 1983, received by the Board on October 28, 1983, by which you make application to this Board for an Order firstly requiring the Director of Assessment to provide to his Solicitor certain information concerning assessments of commercial properties in the Town of Stellarton more particularly referred to in your letter of October 25th and secondly requiring the Director of Assessment or his Solicitor to provide D. Porter & Son Limited the tapes used to record the proceedings before the Regional Assessment Appeal Court.
>
> The Board is not prepared to issue the Order requested in your letter of October 25, 1983. The Board is not satisfied that it has authority to issue the Order requested by you and furthermore,

> even if the Board does have authority to do so, the Board is not satisfied that it would be appropriate to do so based on the information presently at hand.
>
> The Board is prepared to convene a pre-hearing without prejudice conference with respect to your efforts to gain information from the Director of Assessment respecting the forthcoming appeal hearing. This conference would only be convened if such a procedure is agreed upon by yourself and Miss Tyson. In that connection, I am sending a copy of this letter directly to Miss Tyson. If Miss Tyson and you are in agreement that such a pre-hearing conference should be held, the Board will endeavour to arrange for such a conference to be held at the Board's offices at the earliest convenient date to all concerned."

Subsequently, Counsel for Porter had issued through the Prothonotary's Office two subpoenas directed to Merle Gordon and Ronald Zinck, assessors with the Pictou Region Assessment Office, which directed them to bring with them all assessment records, cards and information etc., concerning the properties set out in the letter by Counsel for Porter to the Board dated October 25, 1983.

There were no objections to the Board's jurisdiction to hear the appeal and the Board assumed jurisdiction to hear the merits of the appeal.

At the commencement of the hearing on November 15, 1983, Counsel for Porter asked the Board to issue an Order directing the Director to make all the material brought by means of subpoena available immediately to Counsel for Porter so that they could examine the material. Counsel for the Director objected to this procedure and indicated that some of the material requested was confidential and privileged.

She argued that it was not relevant that evidence be submitted about the precise details of the assessments of the properties requested by Counsel for Porter. She further argued that the information requested was not relevant to the issue before the Board, namely, the market value of the Porter property. Counsel for the Director submitted that if the Board determined that the documents under Subpoena were admissible, the appropriate time for admitting them in evidence would be when a witness was being examined on a particular matter.

Counsel for Porter said the information was not requested to establish the market value of the subject property but to show that the subject property was not assessed in accordance with the uniformity requirement of Section 38 of the Assessment Act. Section 38 of the Assessment Act reads as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Counsel for Porter stated that he wanted access to the assessment records of thirteen of the largest commercial properties in the Town of Stellarton to show how "the law" had been applied to those thirteen properties by assessors in the Pictou County Assessment Region. Then he would show how "the law" had been applied to the Porter property and the inequality in the application of "the law" by the assessor between the Porter property and the thirteen properties selected. "The law" referred to by Counsel for Porter is Section 38 of the Assessment Act.

Counsel for Porter argued that Section 38 of the Assessment Act is to be interpreted in light of Section 15(1) of the Canadian Charter of Rights and Freedoms which reads as follows:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Specifically, Counsel for Porter suggests that Section 15(1) of the Canadian Charter of Rights and Freedoms guarantees equal benefit of the law and that Porter has not received equal benefit in the application of Section 38 of the Assessment Act by the assessors in the Pictou County Assessment Region when compared with certain other commercial establishments in the Town of Stellarton. Counsel for Porter said he intended to show that Section 38 is not applied evenly because the assessment of the Porter property is twice as high as the assessments of other commercial properties of a similar nature in the Town of Stellarton.

Unfortunately for Counsel for Porter Section 15(1) of the Canadian Charter of Rights and Freedoms had not yet come into force. Therefore, the above arguments are not valid.

Counsel for Porter also argued that the information was relevant to show the inconsistencies in the application of the cost method of valuation by the assessor in valuing the Porter property and in valuing other commercial property in the Town of Stellarton.

Upon questioning from the Board, Counsel for Porter indicated that he intended to establish the market value of the thirteen commercial properties indicated in the Subpoenas through the evidence of an expert and then compute the level of assessed value to market value for each of the 13 properties. He would then compute the level of asssessed value to market value of the Porter property. Finally he would compare the level of assessed value to market value of the Porter property with the level of assessed value to market value of the thirteen other properties to show that the Porter property was not being assessed uniformly with the 13 properties. Counsel for Porter submitted that all properties should receive the same benefit of the assessor's judgement and if the assessor is lenient in the application of the rules of assessment to thirteen properties he should be lenient in the application of the rules of assessment to Porter.

The Board decided that it would not issue an Order directing the Director to make the information requested available immediately to Counsel for Porter but that it would proceed with the hearing on the basis that it would rule from time to time on the admissibility of any particular piece of evidence. The Board also indicated that it did not feel that it was relevant to have a lot of information about the cost to reproduce other buildings in the Town of Stellarton since the real issue before the Board was the market value for assessment purposes of the Porter property, evidence of which could be given by the assessor and the appraiser for Porter, both of whom had prepared appraisal reports.

Counsel for the parties asked for an adjournment of the hearing to enable the assessor and appraiser to get together to attempt to agree on some facts and other matters which would be dealt with at the resumption of the hearing. The Board agreed and adjourned the hearing with the agreement of Counsel to January 17, 1984.

No evidence was called during the hearing on November 15, 1983, although there was extensive argument by Counsel on the above-noted preliminary matters.

Witnesses appearing on behalf of the Director were Merle Gordon, N.S.I.A., a senior assessor in the Pictou County Assessment Region and Sam Farrell, Co-ordinator of Assessment Manuals with the Assessment Division of the Department of Municipal Affairs. Witnesses appearing on behalf of Porter were Clarence Porter, President of D. Porter & Son Limited, Brian Casey, a draftsman employed by D. Porter & Son Limited and Eric Piccott, A.A.C.I., an appraiser with Pat King Appraisals Limited. The Director set out the following grounds of appeal in his Notice of Appeal filed as Exhibit P-1, namely:

> "1. THAT the value determined by the Regional Assessment Appeal Court is too low and does not represent the market value of the subject property as of

> January 1, 1980;
>
> 2. THAT the Regional Assessment Appeal Court misinterpreted the meaning of uniformity in section 38 of the Assessment Act and that misinterpretation resulted in the Regional Assessment Appeal Court arriving at a value of the subject property which is not in accordance with section 38 of the Assessment Act;
>
> 3. THAT the Regional Assessment Appeal Court was wrong in concluding that other similar properties in the region had not increased in assessed value as much as that of the Appellant and in altering the assessed value for that reason;
>
> 4. THAT the Regional Assessment Appeal Court wrongly rejected evidence of the Director of Assessment and wrongly accepted evidence of D. Porter & Son Limited;
>
> 5. Such other grounds that may appear from the evidence."

The decision of the Regional Assessment Appeal Court reads as follows:

> "The subject property is an established Wholesale and Retail outlet for building materials located on Foord Street in the Town of Stellarton, Pictou County, Nova Scotia. It is a long-established business which has expanded over the years since 1911. The business is involved in several aspects including retailing and manufacturing. The total area of the property is 6.6 acres, all entirely within the town limits. Presently, there are nine buildings located on the property. The property is full-serviced. There is over 40,000 square feet of asphalt paving of which only 31,000 feet of paving was given any value by the assessor. The assessment was based on the cost approach to value. The assessor has placed a value of $600,000.00 on the land and building $100,000.00 on the equipment and a $300,000.00 assessment on the business occupancy which is one-half of the land value.
>
> The Appellant's grounds for appeal are that his

> assessment has been increased too much in relation to other similar properties in the area. The Appellant checked throughout the town and examined various businesses and properties and found the assessment only slightly increased between assessment years for those businesses and nearly tripled for the Appellant's business. All nine buildings were examined of which it must be noted that a new building was constructed and added to the assessed value since the last reassessment. Both parties submitted evaluation reports.
>
> Having adduced all the evidence presented at the hearing and the two briefs submitted by the two solicitors as well as examination of the assessment act and in particular Section 38 of the said act I must find that uniformity in assessment in the same area must be paramount in this particular situation at least. Chief Justice Ilsley and Mersey Paper Company v. County of Queens, 18 D.L.R. (2d.) 19, dealing with the history of what is now Section 38 of the Assessment Act, stated as follows: "I think the history of this rule in the words beginning 'so as' show that the legislation by the Second Amendment tennant that the dominant and controlling factor in determining the amount of which property is to be assessed shall not be its actual cash value but uniformity. I think the first part of the rule directs assessment of property at its actual cash value its subsidiary or a subordinant to the latter part of the rule".
>
> In any event, an examination of other property in the Stellarton area I find that the correct assessment for the property located at Foord Street should be $380,000.00."

The Porter property consists of approximately 6.5 acres of land located on the east of South Foord Street, in the Town of Stellarton, Pictou County, approximately one-half mile south of the main business area of the Town and one and one-half miles south of the Trans-Canada Highway. The subject site is a long and narrow configuration located between South Foord Street on the west and the East River on the east. Access to the site from South Foord Street is over two CNR railway lines. The topography of the site is generally level although slightly below grade in some areas. There is a steep slope at the east side of the lot toward the East River. Approximately 1.6 acres of land is unusable because of proximity to the riverbank.

Approximately 47,644 square feet of the site is improved with asphalt paving.

There are nine buildings located on the site. The Porter business was started in 1911. Until 1966, the business was mainly a manufacturing operation. In 1966 Porter began a retail operation on the site. At the time of the appeal, the Porter business was primarily a wholesale and retail building supply operation although still manufacturing certain building materials such as trusses, mouldings, and finger jointers. The buildings were added as the business expanded.

Building No. 1 is a one-storey structure with an attic and full basement containing an area of 6,236 square feet. Part of the building was constructed in 1948 and used as an office. An addition was added in 1968 when the company began its retail building supply operation. The building is presently used as an office and retail outlet.

Building No. 2 is a one-storey building with a total area of approximately 17,424 square feet. It also was built in stages with 3,860 square feet built in 1948, 3,000 square feet built in 1956 and 10,564 square feet built in 1970. It is used to store building materials.

Building No. 3 is a one-storey building with full basement containing an area of 7,872 square feet. It was built in 1975 and it is used for the storage and display of windows.

Building No. 4 is a one-storey building with an area of approximately 1,300 square feet. It was originally built in 1918 and was remodelled in 1970. It is used for the storage and display of various floor coverings.

Building No. 5, which was built in 1976 and has an area of 3,041 square feet, was erected to house a dry kiln and to store lumber and is presently used for the storage of lumber. The dry kiln is now located in Building No. 8.

Building No. 6 was constructed in three stages. The first stage, built in 1911 containing 9,000 square feet, was the old factory building and except for the storage of manufacturing equipment, it is rarely used today. The second stage built in 1956 contains 4,800 square feet and is used for the storage of dry lumber. The third stage, built in 1971, contains 4,657 square feet and is the planing mill. The height of the oldest part of the building is two storeys while the remainder is one storey.

Building No. 7 is a group of canopies built in 1976 containing 5,544 square feet of roof-protected area used for the storage of lumber.

Building No. 8 is a one-storey building containing 16,470 square feet constructed in 1979. It is used for the manufacturing of trusses, mouldings and finger jointers. It also contains the dry kiln.

Building No. 9 is a small building constructed in

1978 to house a generator. It has not been used since 1981.

Merle Gordon, N.S.I.A., is a Senior Assessor in Pictou County Assessment Region. He prepared an assessment report with respect to the subject property, a copy of which was filed as Exhibit P-14. In Mr. Gordon's opinion, the market value of the subject property for the 1982 assessment year is $596,200.00.

Mr. Gordon used the cost approach only in estimating the market value of the subject property. The cost approach involves valuing the land and adding to it the depreciated value of the buildings and other improvements. Loss in building value may be the result of physical, functional and economic causes. Mr. Gordon estimated the market value of the subject property as of January 1, 1980 for the 1982 assessment year in order to comply with the uniformity provisions of Section 38 of the Assessment Act. January 1, 1980 is the date selected to determine the market value of all properties in the Town of Stellarton for the 1981 assessment year and the 1981 assessment is carried forward for the 1982 and 1983 assessment years.

Mr. Gordon calculated the market value of the subject property by the cost approach as follows:

	Reproduction Cost	Physical Depreciation	Functional Obsolescence	Depreciated Value
Land	42,700	-	-	42,700
Paving	30,969	-	-	30,969
Buildings	1,155,249	449,068	183,607	522,574
Total Property Value	2,228,918	449,068	183,607	596,243
			(rounded to)	596,200

In determining the land value of the subject property, Mr. Gordon considered the sale of six properties in the Town of Stellarton, five of which sold in 1979, and one in 1976. Based on these sales, he arrived at a land value of 20¢ per square foot. He estimated the total usable land area on the site to be 4.9 acres or 213,444 square feet. By multiplying the usable land area (213,444 square feet) by the rate per square foot (20¢) he arrived at a land value of $42,688.00 which he rounded to $42,700.00.

The site is improved with 47,644 square feet of asphalt paving. Mr. Gordon estimated the paving value to be 65¢ per square foot. By multiplying the pavement area of 47,644 square feet by the rate of 65¢ he arrived at a pavement value of $30,969.00.

Mr. Gordon calculated the reproduction cost of the nine buildings on the site by reference to Boeckh's V-Day Manual published in 1971. He adjusted these costs by an index supplied by Boeckh to reflect the 1971 costs as of January 1, 1980. The Boeckh's V-Day Manual is a costing manual which provides information on construction costs on different types of commercial and industrial buildings. Mr. Gordon calculated the reproduction costs for each building separately and added the sum of the reproduction costs of the nine buildings to arrive at a total reproduction cost of $1,155,249.00.

Mr. Gordon used the age-life method in estimating the amount of physical depreciation in each of the nine buildings. The age-life method of estimating physical depreciation involves calculating the ratio of the effective age of the building over the building's economic life and applying that ratio to the reproduction cost of the building. He calculated the amount of physical depreciation in each building and added the sum of the amount of physical depreciation for each building to arrive at a total estimate of physical depreciation of $449,068.00.

Mr. Gordon stated that the subject property has functional obsolescence because the business was being operated in nine buildings scattered over the site thus increasing the cost of operations. In determining the amount of functional obsolescence, Mr. Gordon costed the replacement of the present utility of the nine buildings using modern techniques and construction materials in one building; subtracted the cost of the replacement building from the reproduction cost of the nine buildings; divided the difference between the reproduction cost of the nine buildings and the cost of the replacement building by the reproduction costs of the nine buildings to arrive at a fraction which he applied to the depreciated building value. Using the above method, Mr. Gordon calculated the amount of functional obsolescence in the subject property as follows:

Reproduction Cost - 9 buildings	1,155,249
Replacement Cost of 1 building	852,711
Difference in cost:	302,538

$$\frac{\text{Difference in Cost}}{\text{Reproduction Cost of 9 buildings}} = \text{Functional Obsolescence Ratio}$$

$$\frac{302{,}538}{1{,}155{,}249} = 26.18\% \text{ (rounded to } 26\%\text{)}$$

Reproduction Cost - Physical Depreciation = Depreciated Reproduction Cost

1,155,249 - 449,068 = $706,181.00

Depreciated Reproduction Cost x Functional Obsolescence =
Functional Obsolescence Ratio

706,181 x 26% = $183,607.00

In constructing a suitable replacement building, Mr. Gordon estimated that a single building containing approximately 57,150 square feet of manufacturing, warehousing and display space and 1,000 square feet of office and retail space would replace the utility of the existing nine buildings. Mr. Gordon, with the assistance of Mr. Farrell, estimated the space being used by Porter in the nine buildings to be approximately 57,195 square feet. This estimate was based on a knowledge of the actual amount of space in each building and an estimate, based on observation, of the amount of space being used in each building. The estimated space being used in each building was added to arrive at the total space being used of 57,195 square feet. Mr. Gordon calculated the total amount of usable space in the nine buildings to be 76,299 square feet. He excluded that space which was not being used by Porter from his estimate of building area for the replacement building.

Mr. Gordon's cost estimate of $852,711.00 was calculated from Boeckh's V-Day Manual using the model of a pre-engineered steel frame light manufacturing building with a large floor area and the model of an industrial office.

On cross-examination, it was pointed out to Mr. Gordon that he erred in some of the components he included in Buildings Numbered 1, 2, 6 and 8. Some of these errors included such things as the appropriate thickness of concrete foundations, whether the concrete was reinforced or not, the materials used for partitions, thickness of certain walls and the type of roofing. Mr. Gordon stated that he was not able to get details about materials used in constructing the nine buildings from Mr. Porter and he had to guess when costing some components. He stated that he was prepared to change his cost estimates to allow for the differences between the cost of actual material in the building and the cost of material he included in the building. Taking into account all the items pointed out to him by Counsel for Porter, Mr. Gordon stated that his opinion of market value would be reduced by $3,000.00 from $596,200.00 to $593,200.00.

Eric Piccott, A.A.C.I., is a member of the Appraisal Institute of Canada and a Director of Pat King Appraisals Ltd. He gave expert opinion evidence respecting the market value of the subject property on behalf of Porter. He prepared an Appraisal Report with respect to the subject property, a copy of which was filed as Exhibit P-46.

Mr. Piccott used the cost approach in arriving at his opinion of market value pursuant to Section 38 of the Assessment Act. He did not use the income approach or the direct sales comparison approach to value the subject property because there was insufficient market data to support a valuation by these methods.

Mr. Piccott calculated the market value of the subject property by the cost approach to be $236,000.00 as follows:

	Reproduction Cost	Physical Depreciation	Functional Obsolescence	Depreciated Value
Land	$42,689.00	-	-	$42,689.00
Paving	30,969.00	-	-	30,969.00
Building	909,623.00	$307,339.00	$439,667.00	162,617.00
	$983,281.00	$307,339.00	$439,667.00	$236,275.00
			(Rounded to)	$236,000.00

Mr. Piccott agreed with Mr. Gordon's land value and paving value. Mr. Piccott and Mr. Gordon also agreed on the reproduction cost and amount of physical depreciation for Buildings No. 3, 4, 5, 7 and 9. Mr. Piccott disagrees with Mr. Gordon's reproduction costs and amount of physical depreciation for Buildings No. 1, 2, 6 and 8. He also disagrees with Mr. Gordon's estimates for functional obsolescence and economic obsolescence.

Mr. Piccott calculated the reproduction cost of the nine buildings by reference to various models in Boeckh's Valuation Manual published in 1978. He adjusted these costs by an index supplied by Boeckh to reflect the 1978 costs as of January 1, 1980. Like Mr. Gordon, he calculated the reproduction cost of each building separately and added the sum of the reproduction costs of the nine buildings to arrive at a total reproduction cost of $909,623.00 for the nine buildings. Both Boeckh's V-Day Manual and Boeckh's Valuation Manual are used by assessors and appraisers in estimating the reproduction cost of buildings and if properly used both Manuals should give a reasonably similar estimate of the cost to reproduce a particular building.

Mr. Piccott also used the age-life method in estimating the amount of physical depreciation in the nine buildings which he calculated to be $307,339.00.

Mr. Piccott applied economic obsolescence at the rate of 5% to the depreciated reproduction cost of the nine buildings. At Pages 56 and 57 of his report, Mr. Piccott states:

> "The subject property is located a short distance north of the C.N.R. shunting yard in Stellarton and two C.N.R. tracks are located off South Foord Street, between the street and the buildings.
>
> Mr. C. Porter, owner of D. Porter & Son Ltd., has indicated to me that the use of the tracks for shunting during the open hours of business operations causes the following problems:
>
> 1) Customers are delayed from egress and exit when the track is blocked.
>
> 2) Extra time delays for personnel are caused when lumber is required from the storage yard across South Foord Street and the track is blocked.
>
> Enquiries to the C.N.R. Railway yard agent in Stellarton indicated that the two railway lines are used for passenger trains, freight trains and shunting operations. During D. Porter & Son hours of business, there are an average of 2 passenger trains daily and 2 freight trains daily. Shunting takes place twice a business day on average and includes 25 to 30 cars. Delays for access and egress to D. Porter & Son was confirmed by the yard agent.
>
> The locational (economic) obsolescence is subjective in nature and is difficult to quantify, however, we are of the opinion that 5% obsolescence for the above items is warranted."

Mr. Piccott applied functional obsolescence at the rate of 68% to the depreciated reproduction cost of the nine buildings. He used the same method in calculating functional obsolescence as Mr. Gordon. Mr. Piccott did not personally determine the amount of functional obsolescence in the subject property. He accepted a plan for a replacement building designed by Clarence Porter and costed by Mr. Casey, an employee of D. Porter & Son Limited as a suitable replacement building for the calculation of functional obsolescence in the existing buildings.

Mr. Casey calculated the cost of the replacement building developed by Mr. Porter to be $287,633.00. On this basis, Mr. Piccott calculated the rate of functional obsolescence as follows:

Reproduction Cost of 9 buildings:	$909,623.00
Cost of One Replacement building:	287,633.00
Cost Difference	621,990.00
	Divided by
Total Reproduction Cost	909,623.00
Functional Obsolescence Rate	68%

Mr. Piccott added the functional obsolescence rate of 68% and the economic obsolescence rate of 5% to arrive at a combined rate for functional obsolescence and economic obsolescence of 73%. He applied this rate of 73% to the depreciated building value of $602,284.00 (reproduction cost of $909,623.00 minus physical depreciation of $307,339.00) to arrive at his estimate of functional and economic obsolescence of $439,667.00.

Mr. Piccott did not check to see if Mr. Porter's replacement building adequately reflected the space he was using in the existing nine buildings. He did not check Mr. Casey's cost calculations to see if they were an accurate reflection of the cost of the replacement building developed by Mr. Porter. In effect, Mr. Piccott simply did an arithmetic calculation based on data supplied to him by Mr. Porter and Mr. Casey to arrive at a rate to apply for functional obsolescence and then adopted that rate in determining his opinion of market value of the subject property.

Clarence Porter disagreed with Mr. Gordon's choice of a building containing approximately 57,000 square feet as an an appropriate building to replace the utility of the existing nine buildings on the subject property. Mr. Porter stated that he could operate his business in one replacement building having an area of 27,200 square feet including space for manufacturing, storage, display, retail and offices purposes. Mr. Porter made a rough sketch of a building he had in mind and had Brian Casey, a draftsman employed by Porter, prepare a set of blueprints of his proposed replacement building. Mr. Porter further instructed Mr. Casey on the type and quality of materials to use in the replacement building. Using the blueprints he developed on Clarence Porter's instructions, Mr. Casey estimated the cost of the replacement building using material prices from Porter's retail selling prices. Labor costs were arrived at based on two quotes from local contractors who were given Brian Casey's blueprints and specifications and asked to provide an estimate of labor costs to construct a 300' x 90' building.

At the commencement of the hearing, Mr. Piccott filed a copy of his Appraisal Report (Exhibit P-7) with the Board. In this report, he estimated the amount of functional obsolescence based on his own observations of the physical layout of the site and his own costing of a suitable building to replace the utility in the existing buildings. During the hearing, Mr. Piccott's original report was withdrawn, on the basis that the report had been pre-filed only and had not been officially tendered as an exhibit, and replaced with a new report (Exhibit P-46) in which he adopted Mr. Porter's replacement building and costs for purposes of determining functional obsolescence.

Mr. Piccott was subjected to a detailed cross-examination on his knowledge and use of Boeckh's Valuation Manual in costing buildings and how he arrived at his estimate of reproduction costs for Building No. 1, 2, 6 and 8. During the course of this cross-examination, a number of errors were identified which indicated that Mr. Piccott did not properly use the Manual in costing Buildings No. 1, 2, 6 and 8 and which cast doubt on his understanding of how the Manual is used to develop building costs. Mr. Piccott incorrectly calculated the cost of the basement, lighting, foundation walls, basement walls and interior finish in Building No. 1. He used an incorrect ratio which affected the wall costs in Building No. 2. The models he selected for Buildings No. 2 and 8 were 40% open sided whereas Buildings No. 2 and 8 are not 40% open sided. He did not adjust for framing costs and wall openings in some buildings where they differed from the model he selected. He did not include such costs such as scaffolding, roof drainage and partial foundation wall in Building No. 1 and roof trusses in Building No. 8.

Counsel for Porter submits that the Board has the choice of choosing the reproduction costs and amount of physical depreciation of either Mr. Gordon or Mr. Piccott because both of their calculations exhibited inaccuracies. However, Counsel for Porter submits that the only option open to the Board in determining functional obsolescence is to accept Mr. Porter's evidence on an appropriate replacement building and Mr. Casey's cost of that building. Counsel for Porter argued that Clarence Porter is the only one who can determine an appropriate replacement building for his needs because of his knowledge of the existing utility of the present buildings and his experience in the lumber and building supply industry.

Counsel for the Director submits that the Board should accept the evidence of Mr. Gordon and Mr. Farrell with respect to reproduction cost, physical depreciation and functional obsolescence. She further submits that very little weight, if any, should be given to the evidence of Clarence Porter, Brian Casey and Eric Piccott.

The issue in this appeal is the valuation of the subject property for the 1982 assessment year. The first part of Section 38 of the Assessment Act states that all property shall be assessed at market value.

Both the Director and Porter agree that the most appropriate method to use in determining the market value of the subject property is the cost method. Both parties agree on land value, paving value and the reproduction cost and physical depreciation of five of the nine buildings. There is disagreement on the reproduction cost and physical depreciation of four of the nine buildings and the appropriate amount of functional and economic obsolescence.

Mr. Gordon's estimate of market value of the subject property is $593,200.00 and Mr. Piccott's estimate is $236,000.00, a difference of $357,200.00. Mr. Piccott's estimate of the depreciated reproduction cost of all nine buildings is approximately $101,000.00 less than Mr. Gordon's estimate ($602,280.00 vs. $703,181.00) and his estimate of functional and economic obsolescence is approximately $256,000.00 greater than Mr. Gordon's estimate ($439,667.00 vs $183,607.00).

The evidence presented on behalf of Porter was of little assistance to the Board in determining the market value of the subject property.

The Board does not attribute any weight to the evidence of Mr. Piccott. While Mr. Piccott acknowleged that some of his calculations with respect to the reproduction costs of the various buildings were in error, he concluded that the inaccuracies were insignificant and would not alter his final opinion of market value. In the opinion of the Board, the errors made by Mr. Piccott in calculating the reproduction costs of the various buildings were significant in dollar value and substantially understated the reproduction cost. The errors also indicated that Mr. Piccott had incorrectly applied the costing manual in calculating the reproduction cost of the subject property. The Board is satisfied that Mr. Piccott's calculations of reproduction cost are not a reliable estimate of the reproduction cost of the various buildings.

The Board also questions the independence of Mr. Piccott's final opinion of market value. The Board finds it unacceptable for Mr. Piccott, who was retained by Porter as an independent expert property appraiser, to calculate the amount of functional obsolescence in the subject building by relying upon a replacement building and cost estimate developed by Clarence Porter without first satisfying himself that the building was an appropriate replacement building and that the cost estimates were accurately calculated.

Mr. Piccott's final estimate of the depreciated value of all nine buildings was $162,617.00. The accuracy of this estimate is questionable in light of the fact that Building No. 8 was constructed in 1979 for $130,289.00 and some of the material and labor were supplied from Porter's own operations.

The Board disagrees with the submission of Counsel for Porter that Clarence Porter's evidence on an appropriate replacement building should be accepted without question. As a witness, Mr. Porter did not exhibit the independence and objectivity necessary to enable the Board to rely upon his testimony. He is the President and majority owner of the respondent company, which has a substantial financial interest in the outcome of the appeal. His deeply held conviction expressed during the hearing that his company is being unfairly treated by assessors and the assessment division of the Department of Municipal Affairs in comparison with other properties in the Town of Stellarton, indicate a personal antagonism with the assessment system and colors his testimony. Mr. Porter was also uncooperative and evasive in responding to questions by Counsel for the Director. He indicated that he was selling his property but stated that he was not sure what price he would be asking for the property. He also stated that the company carried insurance on the nine buildings at replacement cost but he would not give the amount of coverage when asked by Counsel for the Director.

The Board is also of the opinion that the replacement building designed by Mr. Porter for purposes of determining functional obsolescence in fact reduces the size of the Porter operation and is not a true measure of functional obsolescence. In 1979, Porter built a manufacturing building containing 16,470 square feet. The Board is doubtful that the balance of the present Porter operation could be carried on with another 11,000 square feet of space as suggested by Mr. Porter.

Brian Casey was not called as an expert witness but as a draftsman employed by Porter, who prepared blueprints and cost estimates of the replacement building suggested by Clarence Porter. At all times Mr. Casey was acting on the instructions of Mr. Porter. He could not be considered an independent witness. The Board has serious doubts about the reliability of the cost estimates put forward by Mr. Casey. He acknowledged that he is not trained to estimate the construction costs of buildings. He is trained as a draftsman and this is the occupation in which he has had most of his work experience. His experience in cost estimating is limited. He is not familiar with appraisal methods. The Board is not satisfied that Mr. Casey has the experience and training necessary to accurately determine the cost of the replacement building developed by Mr. Porter. It is difficult to understand why Mr. Casey estimated the cost of the replacement building and Mr. Piccott, who is a trained and experienced appraiser and who was retained by Porter as an independent appraiser, did not estimate the cost to construct the replacement building.

In the opinion of the Board, the best evidence of market value of the subject property was the evidence on behalf of the Director. Mr. Gordon's knowledge and use of the costing manuals were superior to Mr. Piccott's knowledge. Although Mr. Gordon erred in costing some components of the subject buildings, these errors occurred because he was not supplied with accurate information on the type of material used in the building. He also altered his calculations of reproduction cost to take into account the inaccuracies pointed out by Counsel for Porter. The Board accepts Mr. Gordon's and Mr. Farrell's evidence with respect to functional obsolescence. The major disagreement between Porter and the assessors in determining functional obsolescence concerns the size of the replacement building chosen by the assessors. The Board is satisfied that the replacement building chosen by Mr. Gordon is a reasonable attempt to place the existing Porter operation in one building and therefore remove the functional obsolescence in having the Porter operation carried on in nine buildings spread over the subject property.

Mr. Gordon and Mr. Piccott disagreed on whether the market value of the subject property was affected by its location. At times, entrance to and exit from the property is delayed because of the shunting of railway cars and the passing of passenger and freight trains. There was conflicting testimony about the number of times a train passes in front of the property in a day causing delays to customers and also the length of the delays. Mr. Piccott could not measure the adverse effect on market value caused by the location of the CNR tracks in front of the subject property. The Board is not satisfied there was sufficient evidence to indicate the location of the CNR track adversely affected the market value of the subject property. If there is an effect on market value of the property because of the location of the CNR track, it is marginal and the evidence presented by Porter was insufficient to enable the Board to measure the loss in value.

The Board accepts the evidence of the assessor that $593,200.00 is the proper value of the subject property for assessment purposes for the 1982 assessment year.

Counsel for Porter also argued that the subject property was not assessed in accordance with the uniformity provisions of Section 38 of the Assessment Act which state "but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality".

Counsel for Porter argued that to achieve uniformity of assessment, the Porter property should be assessed in the same manner and at the same percentage of market value as thirteen other large commercial properties in the Town of Stellarton. Counsel for Porter wished to introduce evidence to show that the market value of these thirteen commercial properties is greater than the market value (i.e. assessed value) determined by the assessor. Counsel for Porter stated that because the assessor did not assess these properties at market value, they are under-assessed in relation to the Porter property which is assessed at 100% of market value. None of the thirteen properties selected by Porter for comparison had sold or had been offered for sale recently. The market values that Porter wished to dispute were the assessor's opinion of market value for assessment purposes of these properties. The Board did not allow the introduction of evidence relating to the market value for assessment purposes of thirteen other commercial properties in the town because it was not relevant to the issue before the Board, namely, the determination of the assessed value of the subject property in accordance with Section 38 of the Assessment Act. Conceivably, the Board could spend several months hearing evidence on the market value on the other thirteen properties when the issue before it is the market value of the subject property. Even if Porter was successful in showing that the thirteen properties were under-assessed, this would not have been sufficient evidence for the Board to reduce his assessment. If Porter felt that the other properties are under-assessed, he could have appealed those assessments pursuant to Section 77(2) of the Assessment Act.

Uniformity has been considered by the Appeal Division of the Supreme Court of Nova Scotia and in Hebb v. Town of Lunenburg (1979), 32 N.S.R. (2d) Chief Justice McKeigan stated at Pages 435 to 437:

"Chief Justice Ilsley commented in Re Mindamar Metals Corporation Limited and Municipality of the County of Richmond.....at p.78:

> If this were a case where there was in the municipality property of a like class with the property the assessment of which is complained of, and also a general level of assessed values of such property of like class which bore a lower ratio to the actual cash value thereof than the ratio of the assessed value to the actual cash value of the property whose assessment is complained of, it may very well be that the assessment complained of should be lowered even though it is not in excess of the actual cash value.

In Lehndorff Management Ltd. v. City of Dartmouth. . . Macdonald, J.A., (p.45) approved the above statements and emphasized that since the Mersey Paper case:

> ...uniformity rather than actual cash value is the dominant and controlling factor in determining the amount at which property is to be assessed.

The uniformity that is thus dominant and controlling is not, however, uniformity unrelated to "actual cash value". "Uniformity" is not to be based on some general community or judicial standard of fairness or value or comparability.

The test of uniformity arises where, as Chief Justice Ilsley said in Mindamar, supra, there is a "general level of assessed values of other properties which bore a lower ratio to the actual cash value thereof than the ratio of the assessed value to the actual cash value of the property whose assessment is complained of...."In Morash v. Municipality of Chester, supra, Ilsley, C.J., referred to Mindamar and Mersey Paper and said (28 D.L.R. (2d) at p.429):

> As will be seen, I do not think that the mere fact that the assessor assessed certain other individual properties lower in relation to their actual cash value than he assessed the appellant's property is ground for allowing the appellant's appeal. It may be that the other assessments are out of line rather than his. I think a comparison between the assessment of the appellant's

> property and those of others would be relevant only if it were shown that the general level of assessment of properties in the municipality was lower in relation to the actual cash value, as defined in the Assessment Act, R.S.N.S. 1954, c.151, than the assessment of the appellant's property.

At p.430, he continued:

> In assessing the appellant's property, therefore, it was the assessor's duty to determine its actual cash value, but if, because of the failure of the assessor to discharge his duty with regard to the assessment of other properties in the municipality a general level of assessment had been established which was below actual cash values by a fairly definite percentage thereof, it would have been the duty of the assessor to discount for purposes of assessment the actual cash value of the appellant's property to a level which was of the same percentage below its actual cash value.

To show error by the assessor, an appellant such as Mr. Hebb accordingly must either establish that his property was assessed at more than its actual cash value, and here the actual cash value was admitted to be at least $43,900.00, or prove that "the general level of assessment of properties in the municipality was lower in relation to the actual cash value" than was his assessment.

A county court judge in an assessment trial de novo should apply the s.38 rules as directed by Chief Justice Ilsley. He should, I suggest, first ascertain the actual cash value of the property under appeal and determine the ratio of the assessment to that value. He then should determine the "general level of assessment" relative to the actual cash values of properties in the town or municipality generally. To do so he should ascertain on the evidence before him whether the general assessment ratio is what the assessor states it is or whether it is a different ratio. In most cases lack of other evidence may compel him to accept the assessor's ratio. If the ratio is thus higher, the judge should reduce the appealed assessment to conform with the general ratio."

The Board has determined that the Porter property was not assessed at more than its market value and there was no evidence presented by Porter to show that "the general level of assessment" of property in the town was lower in relation to market value than was Porter's assessment.

The Board is satisfied that Mr. Gordon has properly considered the question of uniformity. All property in the Town was assessed for the year 1981 at 100% of market value, 1981 being a year for the general reassessment of all properties in the Town based on value as of January 1, 1980. All property in the Town was assessed for 1982 at the 1981 assessed value which was based on 100% of market value as of January 1, 1980. Mr. Gordon assessed the subject property for 1982 at 100% of market value as of January 1, 1980. Mr. Piccott also valued the subject property for the 1982 assessment year on the basis of January 1, 1980 cost.

The Board allows the appeal and determines the value of the Porter property for assessment purposes for the 1982 assessment year to be $593,200.00.

The Board also determines that the business occupancy assessment for the 1982 assessment year is $296,600.00 (one-half of $593,200.00).

The Appellant shall be entitled to its costs to be taxed on a party and party basis on the County Court scale by Gerard P. Scanlan, Truro, Nova Scotia.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 18th day of March, 1985.

E. A. Lawrence
ELIZABETH LAWRENCE

Darryl W. Wilson
DARRYL W. WILSON

Manchester Properties Ltd. v. Director of Assessment and City of Dartmouth

ASSESSMENT--COMMERCIAL--MARKET VALUE--MARKET DATA OR DIRECT SALES COMPARISON METHOD--INCOME APPROACH--COST APPROACH--GENERAL LEVEL OF ASSESSMENT
ASSESSMENT--BUSINESS OCCUPANCY--NON-PROFIT
ASSESSMENT ACT, SS.7(1), 25B(1), 38

This is an appeal by Manchester Properties from a decision of the Dartmouth Regional Assessment Appeal Court respecting that portion of the decision which confirmed the 1983 commercial assessment of $895,000.00 and by the Director of Assessment and the City of Dartmouth from that portion of the decision which granted The Billy Club exemption for business occupancy assessment, all with respect to property at 16 Portland St., Dartmouth.

HELD: The appeal of Manchester Properties is allowed and the 1983 commercial assessment is reduced to $740,000.00. The appeals of the Director of Assessment and the City of Dartmouth are allowed and the Board finds The Billy Club is not exempt from business occupancy assessment. The Board does not have sufficient evidence to determine the amount of The Billy Club's business occupancy assessment and will re-convene the hearing to hear evidence on this. The Board will then hear the parties as well on costs.

The price paid to acquire the shares of Manchester Properties cannot be equated with the value of the land and building in question here for the purpose of the direct sales method. To use this information not only must there be a detailed valuation of other assets and liabilities of the company but also evidence of all other matters which influenced the price agreed to by the Vendor and the Purchaser. The income method is also not an appropriate method to use to determine the market value here since the subject property is not the typical investment type of property. In determining the capitalization rate for the income method, there is no evidence of market derived capitalization rates from the sale of comparable properties. There also are no comparable properties or sales from which to derive reliable rental figures. The cost method is an appropriate way to value the subject property because this owner-occupied property is designed to meet the owner's particular needs and a large part of the building is devoted to a service type use which is often valued by the cost method. There is general agreement over reproduction costs and, except for the elevator, over the fact that the property did not have functional or economic obsolescence. The Board finds the service elevator does add value to the building and should be included. The reproduction costs of the interior should be the actual costs since they were recently incurred and there is no allowance for physical depreciation for the same reason. The physical depreciation on the superstructure should reflect the different ages of different parts of the building.

On the question of business occupancy assessment, the relevant portions of the Assessment Act are ss.7(1) and 25B(1). The Board should determine whether The Billy Club is exempt on the basis of evidence presented at the current hearing. The Director and the City are not estopped from claiming the Club is not exempt for 1983 because of an order of the Supreme Court of Nova Scotia in 1979 concerning the 1978 business occupancy assessment of The Billy Club, then known as PANS Social and Recreation Club. The burden of establishing exemption is on the taxpayer. To qualify for exemption under s.25B(1), the organization must be non-profit. To be a non-profit organization it must be organized and operated primarily for any purpose except profit and no income may be payable to or otherwise made available to the members. Here The Billy Club is organized primarily to profit or benefit the "full members." They benefit by having available facilities which they would not otherwise have and in being entitled on dissolution of the Club to a proportionate distribution of the net assets. The Club's primary activity is the carrying on of a restaurant and lounge business. It is in direct competition with taxable dining and drinking establishments, it operates on a full time basis, employs a full time staff of seventeen, makes services available to non-members and has no apparent restriction on who can be an associate member.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967 Chapter 14 as amended;

- and -

IN THE MATTER OF: An appeal by Manchester Properties Ltd. from a decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region;

- and -

IN THE MATTER OF: An appeal by the Director of Assessment and the City of Dartmouth from the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: BRUCE W. EVANS, LL.B., for Manchester Properties Ltd. and The Billy Club;

DOUGLAS J. KEEFE, LL.B., and NIGEL ALLEN, LL.B., for the Director of Assessment;

LOUANNE LABELLE, LL.B., and DEBRA ROZEE, LL.B., for the City of Dartmouth.

DECISION

By Notice of Appeal dated September 23, 1983, received by the Board on September 23, 1983, the Appellant, Manchester Properties Ltd. (hereinafter referred to as Manchester) appealed the decision of the Regional Assessment Appeal Court, Dartmouth

Assessment Region, made August 24, 1983, respecting that portion of the decision which confirmed the 1983 commercial assessment of $895,000.00 for the property known as Civic #16 Portland Street, Dartmouth, Nova Scotia.

By Notice of Appeal dated September 19, 1983, received by the Board on September 19, 1983, the Appellant, Director of Assessment (hereinafter referred to as Director) appealed that portion of the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region, made August 24, 1983, which granted The Billy Club exemption under Section 25B(1) of the Assessment Act for business occupancy assessment for 1983 with respect to a part of the property known as Civic #16 Portland Street, Dartmouth, Nova Scotia.

By Notice of Appeal dated September 22, 1983, received by the Board on September 23, 1983, the Appellant, City of Dartmouth, (hereinafter referred to as the City) also appealed that portion of the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region made August 24, 1983 which exempted The Billy Club from business occupancy assessment for 1983 with respect to a part of the property known as Civic #16 Portland Street, Dartmouth, Nova Scotia.

The three appeals were heard by the Board at the same hearing which took place on January 10th, 11th, 12th and 31st and February 1st, 1984 in the hearing room of the Nova Scotia Expropriations Compensation Board Room, Centennial Building, Suite 904, 1660 Hollis Street, Halifax, N.S. Briefs were filed by Counsel subsequent to the hearing with the last brief received by the Board on March 13, 1984.

There were no objections to the Board's jurisdiction to hear the appeals and the Board proceeded to hear the merits of the appeals.

The first part of this decision deals with the appeal of Manchester, respecting the value of the commercial assessment of the subject property while the second part of the decision deals with the appeals of the Director of Assessment and the City of Dartmouth with respect to the question as to whether or not The Billy Club is exempt from business occupancy assessment, pursuant to Section 25B(1) of the Assessment Act, for that portion of 16 Portland Street, Dartmouth, occupied by it and if not exempt, the appropriate amount of business occupancy assessment.

Evidence on behalf of Manchester and The Billy Club was given by Joseph Ross, Executive Director of The Police Association of Nova Scotia who is also Executive Director of The Billy Club and is the Executive Director of Manchester Properties Limited, Michael Hornby, Chartered Accountant, and Fergus Omond, A.A.C.I., an accredited appraiser. Evidence on behalf of the Director of Assessment was given by Thomas Mills, N.S.I.A., Assistant Director of Assessment for the Dartmouth Assessment Region, and Gloria McCluskey, A.A.C.I., Assistant Provincial Director of Assessment. The City of Dartmouth did not call any witnesses.

The subject property is owned by Manchester, a corporation incorporated under the provisions of the Companies Act, R.S.N.S. 1967, c.42 as amended, on March 2, 1979. The PANS Social and Recreation Club, a society incorporated under the provisions of the Societies Act, R.S.N.S. 1967, c.286, on September 13, 1972, purchased all the outstanding shares of Manchester on December 16, 1980. PANS is an acronym for the Police Association of Nova Scotia formed on April 6, 1966 and subsequently established as a trade union under The Trade Union Act in April 1969. The PANS Social and Recreation Club changed its name to The Billy Club effective August 13, 1982. The name of the society was changed because it was quite similar to the name of the Union which resulted in many bills owed by the Society being forwarded to the Union for payment, thus causing accounting and administrative problems. Manchester leases the entire property to The Billy Club, which occupies the major portion of the subject building for its own purposes and sub-leases parts of the remainder of the building to Anson Development Ltd., a Real Estate Development Corporation and to The Police Association of Nova Scotia. The Billy Club also rents space in its Prince Street Parking lot, which is part of the subject property, to various individuals on a monthly basis.

Manchester set out the following grounds of appeal in its Notice of Appeal filed as Exhibit M-1, namely;

> "1. The Dartmouth Regional Assessment Appeal Court erred in law and in fact by failing to reduce the commercial assessment of $895,000.00;
>
> 2. The Dartmouth Regional Assessment Appeal Court erred in fact in failing to find that the assessor relied solely on the income approach to valuation;

> 3. The Dartmouth Regional Assessment Appeal Court erred in law in accepting the income approach to valuation by the assessor and in law and in fact by disregarding the evidence of the Appellant's chartered accountant that the Appellant Manchester Properties Limited operated at a loss and did not own the property for income purposes;
>
> 4. The Dartmouth Regional Assessment Appeal Court erred in law and in fact in failing to give sufficient weight to the evidence that the cost to the Appellant of recently acquiring and renovating the property was $528,992.00;
>
> 5. The Dartmouth Regional Assessment Appeal Court erred in law and in fact in failing to give sufficient weight to the evidence that the Appellant company, whose sole asset is the property, had been recently purchased by The Billy Club and the property renovated at a total cost of about $672,000.00."

The Regional Assessment Appeal Court confirmed the 1983 commercial assessment of the subject property at $895,000.00.

The Manchester property consists of approximately 21,408 square feet of land located in the downtown area of Dartmouth. The land is irregular in shape and is shown on a site plan forming part of the Pat King Appraisal Report filed as Exhibit M-6. The site has a 56' frontage on Portland Street, a 60' frontage on Alderney Drive and a 90' frontage on Prince Street. Located on the site is a two storey building with a partial basement. The building extends southward from Portland Street, a distance of approximately 120 feet. It measures approximately 55' along the Portland Street frontage and 72' feet along the rear. The building widens to 72' in a westerly direction toward Alderney Drive at a point approximately 70' south of Portland Street. The main entrance to the building is by way of

Portland Street. The topography of the land is uneven with two levels at the rear of the building. The Alderney Drive level provides separate entrances to the basement and first floor of the building. These entrances are used as receiving areas for food and liquor supplies. There is a small freight elevator located at the Alderney Drive entrance to the building. There is a small unpaved parking area used by the staff of The Billy Club in front of the building at the Alderney Drive entrance. The Prince Street level provides an entrance to the top floor of the building where Anson Development Ltd. has its offices and sales rooms. There is also a fire exit from the second floor of the building to the Prince Street level. The Prince Street site contains 10,000 square feet of paved parking which is rented.

The building was constructed in stages and has been renovated and modernized several times. The Portland Street part of the building, which was the original building,was completely rebuilt and expanded in 1971; the middle part of the building, a two storey brick addition, was built in 1950 and the rear of the building, where Anson Development Limited has its offices, was built in 1960.

In 1982 the interior of the building was extensively renovated to provide the required facilities for The Billy Club and office space for The Police Association of Nova Scotia.

The first floor of the building contains a lobby, a small quiet lounge known as Sam Brown's Belt, a large dining area known as Sherlock's Dining Room, a large area containing a bar and space for dining and dancing, known as The Billy Club Lounge, a service area and a fully equipped kitchen.

The second floor of the building contains the offices of Anson Development Ltd., the administrative offices and board room of the Police Association of Nova Scotia, the administrative offices of The Billy Club and a games room used by the Billy Club.

The basement does not extend the full width and length of the building. The existing basement is divided into two separate areas, front and back, with no means of movement from the front area to the back area. The front area of the basement which is accessed only by way of stairs from the main entrance on Portland Street contains washrooms, a coat closet and crawl space used for storage. The rear portion of the basement has an exterior access from Alderney Drive and contains space for drygoods storage, liquor storage, a walk-in cooler and the mechanical, electrical and furnace rooms.

Prior to the acquisition of the shares of Manchester by The Billy Club in 1980, the building was used as a retail outlet by several small businesses. In December 1980, the only tenant in the building was the House of Bridal Fashion.

The Billy Club's former premises were located at 95 Alderney Drive, a short distance from the subejct property. This property was expropriated by the City of Dartmouth in March 1979. The Billy Club was able to remain at its former location until it moved into the subject building in July 1982. The Billy Club wanted to remain in the downtown area of Dartmouth.

According to both Mr. Omond and Mr. Mills, the downtown area of Dartmouth suffered a period of economic decline in the late 1960's and throughout the 1970's but the last five years have witnessed a turn-a-round. The downtown area has been revitalized through the efforts of the Waterfront Development Corporation and the Main Street Program of the Nova Scotia Department of Development and this has resulted in greater pedestrian and vehicle traffic in the area.

Michael Hornby is a Chartered Accountant with a professional office in the City of Dartmouth. His firm, Hornby and Tinkham, has been retained by The Billy Club and Manchester to prepare their annual financial statements. Also he assists in the preparation of annual budgets and advises on financial matters of a general nature. He reviewed the financial position of Manchester on December 16, 1980, the date its shares were acquired by The Billy Club, and the arrangements which led to the purchase of all the outstanding common shares of Manchester by The Billy Club.

By Agreement of Purchase and Sale dated December 12, 1980, The Billy Club agreed to purchase from Peter Claman, Michael Dietrich, Elizabeth Hanson, and Nino Rossi, hereinafter referred to as the Vendors, all the common shares of Manchester for $110,000.00 subject to certain adjustments on the date of closing. The adjusted sale price for all the outstanding common shares was finally determined at $108,300.00. In addition, The Billy Club agreed to pay Elizabeth Hanson, a shareholder and tenant in the subject building, a sum for the loss of the leasehold improvements to the space occupied by her in the subject building. The Vendors and The Billy Club also agreed that Manchester pay Tiny Togs Ltd., a corporate tenant in the subject building owned by one of the Vendor shareholders of Manchester, a sum for the loss of its leasehold improvements. The amount paid to Elizabeth Hanson and Tiny Togs Ltd. for loss of leasehold improvements was $10,300.00. According to Mr. Hornby, this amount appears in the financial records of Manchester as part of the cost of the subject building.

As of December 16, 1980, Manchester's liabilities were $289,354.00 and the value of all its assets other than land and building, was $6,264.00.

According to Mr. Ross, The Billy Club could only afford to pay in the vicinity of $400,000.00 for a building. Although The Billy Club purchased shares of Manchester, it was only interested in the building owned by Manchester. The Billy Club had previously offered to purchase the subject building for $500,000.00 but this offer was refused by Manchester. Subsequently, The Billy Club agreed to purchase all of the shares in Manchester because by so doing, the effective price of the land and building to them was approximately $400,000.00.

Mr. Hornby reconciled the purchase of the shares of Manchester with the approximate $400,000.00 effective purchase price of the land and building as follows:

Cost of Shares:	$108,300.00
Cost to buy leasehold improvements	10,300.00
Net Liabilities (liabilities $389,354.00 less assets other than land and building $6,264.00)	283,090.00
Effective purchase price of land and building	$401,690.00

The subject property had been assessed at $400,000.00 for the 1979 assessment year. The property sold in March 1979 for $245,000.00. The assessment for the year 1979 was appealed to the Regional Assessment Appeal Court which reduced the assessment to $245,000.00. The assessment for 1980 remained at $245,000.00. The assessments for 1981 and 1982 were set at $396,000.00. The building was extensively renovated in 1982 to accommodate the Billy Club and Police Association of Nova Scotia. The cost of these improvements was $270,287.00. The assessment for 1983 which is the subject of this appeal was set at $895,000.00 and confirmed by the Regional Assessment Appeal Court.

Mr. Fergus Omond, A.A.C.I., is a member of the Appraisal Institute of Canada and a director of Pat King Appraisals Ltd. He gave expert opinion evidence respecting the market value of the subject property for the 1983 assessment year on behalf of Manchester. He prepared an appraisal report with respect to the subject property, a copy of which was filed as Exhibit M-6.

Mr. Omond estimated the assessed value of the subject property for 1983 by:

(1) estimating the market value of the subject property as of December 31, 1983,

(2) applying a general level of assessment for 1983 to the estimated market value.

The general level of assessment is the percentage determined by dividing the total assessed value of all properties in the city which have sold in a particular year by the total of their sale prices.

Section 38 of the Assessment Act reads as follows:

> " All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Mr. Omond defined "market value" at Page 7 of his Appraisal Report as follows:

> " The market price of a particular interest in real property may be defined as the amount of money which can be obtained for the interest, at a particular time, from persons able and willing to purchase it, given an appropriate exposure to the market. Value is not intrinsic but results from estimates made subjectively by able and willing purchasers of the benefit or satisfaction they will derive from the ownership of that interest. In order to value an interest, the probable estimates of benefits to potential purchasers must be assessed."

Mr. Omond used three methods to estimate the market value of the subject property.

The first method used was the market data or direct sales comparison method. According to Mr. Omond, this method involves estimating a market value for the subject property from one of the following:

> "A past sale of the subject property;
> Sales of property identical to the subject; or,
> Sales of property comparable to the subject."

At Page 80 of his Appraisal Report, Mr. Omond calculated his estimate of market value under the market data approach as follows:

" MARKET DATA APPROACH

We could find no sales of buildings the same or even closely comparable to the subject. Nevertheless, even if one or more such sales were available, they could not provide as strong or supportable evidence of value as the actual sale of the subject property itself. Accordingly, the basis of our comparative approach was the past sale of the subject plus the value of the improvements and the calculations of this, to reflect a value as of the effective date of this appraisal would be as follows:

Sale Value as of December 16, 1980		$400,000.00
Add:	8% to reflect the passage of time and increased property values since purchase	$103,885.00
Adjusted Sale Value		$503,885.00
Add:	Depreciated Value of "Leaseholds" which are now one year old i.e., $270,287.00 less 14/15	$252,267.00
	Leasehold improvements to Anson Development Limited's space	$ 40,575.00
	Final Market Data Estimate at December 31, 1983	$796,727.00
	(Rounded to	$797,000.00)"

In Mr. Omond's opinion, the market value of the subject property on December 16, 1980 was $400,000.00 because that was approximately the total consideration paid by The Billy Club to acquire land and building through the purchase of the shares in Manchester. In order to establish the market value of the subject property on December 31, 1983, Mr. Omond increased the $400,000.00 by 8% a year for the years 1981, 1982 and 1983. The 8% represents Mr. Omond's estimate of the annual increase in real estate values in the City of Dartmouth for the years 1981, 1982, and 1983. This percentage was obtained by Mr. Omond from data compiled by Pat King Appraisals Ltd. on the sale of commercial and industrial properties in the City during the period 1981 to 1983.

The depreciated cost of leasehold improvements added by Mr.Omond represents the actual cost of improvements to the building subsequent to December 16, 1980 less an allowance for physical depreciation.

The second approach used by Mr. Omond was the income approach. At Page 62 of his Appraisal Report Mr. Omond describes this approach and how he utilized it in valuing the subject property.

> " As previously explained, the Income Approach provides an indication of value by capitalizing the annual net rental potential of the property. Ideally the "net rental" value of the property could be readily obtained by comparison with recent rental agreements involving buildings or space of the same type, finish, size and potential etc. The subject building, however, although not unique is a large 14,308 square foot structure with a number of inherent characteristics, including its sheer size, interior lay-out and design, and of course the extensive leasehold improvements, all of which sets it apart from other downtown Dartmouth properties. So there was no available rental data involving building or space of this type and finish and use in Dartmouth.
>
> Therefore, the only possible approach to establish an income value by use of comparative rents, would be to compare the building as it had existed prior to the "Billy Club" improvements with other general retail and office rentals in Dartmouth; and then to the "capitalized value" of that rent, "add" the recent cost of the leaseholds, less any depreciation to those leaseholds, that may have taken place in the interim period.
>
> Therefore, in persuit of establishing a "shell" or "base" value for the subject's space, we investigated both "leased" and "asking" prices for representative commercial space including a mix of retail and offices. As experience has shown me in the past and affirmed here in this investigation, rental analysis of such properties for the purpose of comparison, to say the least is not as simple or straight forward a task as property comparison."

Mr. Omond stated that older renovated commercial space may be rented on different bases; that is on a "gross basis" with all operating costs paid by the landlord; on a "semi-gross" basis with the tenant paying in addition to a basic rent some costs such as heat or lights; or on a "net basis" with the tenant paying in addition to a basic rent, their apportionment of operating costs or on any combination between gross and net. According to Mr. Omond, more often than not older buildings such as the subject are rented on a "semi-gross" basis. Also he said that more often than not the upper floor in older buildings such as the subject, usually include some interior finish when they are rented. Mr. Omond stated that his investigation of a number of leases and rental offerings indicated that no two leases or rental offerings were found to be "let" or "offered" on exactly the same basis. He had to make adjustments to these rents in order to bring them to a "common unit of comparison". His investigation indicated that operating expenses range from $2.30 per square foot to $3.85 per square foot. He also found that some of the properties he investigated involved new space in which the landlord was responsible for part of the leaseholds and therefore he had to deduct an amount representing the landlord's contribution to leasehold.

Mr. Omond investigated nine rental properties in the downtown area of Dartmouth in order to determine the net rental of the subject property. His investigation and analysis of the rents being charged or being asked for space in these properties indicated a range in rental value in downtown Dartmouth from

$4.51 per square foot to $9.65 per square foot. These amounts were determined after making appropriate deductions for operating expenses and landlord's share of leasehold improvements which were described in the preceding paragraph. Based on his analysis, Mr. Omond estimated the most probable net rental value of the ground floor leaseable area of the subject building at $7.50 per square foot and the second level leaseable area at $6.00 per square foot. He could not find any rental evidence with regard to basement space such as exists in the subject building. In his opinion, the value of the basement area depends to a great extent upon the type of occupancy in use on the first floor. Since The Billy Club uses the basement area in the subject building, he estimated its net rental value at $1.00 per square foot of leaseable area.

Mr. Omond calculated the amount of net leaseable space on the first floor to be 6,108 square feet, on the second floor to be 5,821 square feet and in the basement to be 1,880 square feet by actual measurement of the inside area of the building. He excluded from leaseable areas such common areas as stairwells.

In calculating the net rental potential of the parking lot Mr. Omond used the actual rents being charged for parking spaces less a reasonable expense allowance of 20%.

Mr. Omond calculated the gross rental potential for space in the subject property as it existed prior to renovation by The Billy Club to be $92,984.00. He allowed 3% for vacancy and 15% for expenses of operating the building which resulted in a net rental potential of $76,664.00. He capitalized the net rental potential of $76,664.00 at a rate of 12.65% which resulted in a capitalized rental value of the property prior to leasehold improvements of $606,040.00.

The capitalization rate of 12.65% was determined using the "band of investment theory". At Pages 73 and 74 of his report Mr. Omond explained this theory as follows:

> " Without the benefit of actual sales and actual income data on properties such as the subject, for development of a rate, I have used the "band of investment theory" as a means of rationalizing the appropriate capitalization rate for the subject property.
>
> The capitalization rate developed by application of the band of investment theory is a synthesis of mortgage and equity rates, which market data disclose as applicable to comparable properties. The rate developed is a weighted average, the weighting being for the respective portions of value represented by the mortgage and equity positions, or bands of investment. If the available mortgage terms are known, the debt service or mortgage constant can be determined; and if the cash flow rate required to attract equity capital is known or can be estimated, the overall rate applicable in direct capitalization may be computed.
>
> In this regard, we investigated the type, amount and rate at which probable financing could be obtained on this property. From our survey of lenders and brokers, it was determined that a five year mortgage of 75% loan to value could be had at between 12.75% and 13.25% interest. The normal amortization period for such a mortgage would be between 20 and 25 years. On the other hand, the minimum equity dividend rate would in our view be no less than what can be obtained by "Guaranteed Investment Certificates" which as of the date of this appraisal was 11%.

So that with mortgage terms and minimum equity dividend rates established, the over-all capitalization rate may be computed as follows;

	Percent of Value		Rate		Product
Mortgage Debt Service	0.75	x	.1320*	=	.0990
Equity Dividend	0.25	x	.1100	=	.0275
Overall Rate	100%			=	.1265
			or		12.65%

* The above annual rate .1320, is based on monthly payments and is commonly referred to as the mortgage constant. Source-compound interest and discount tables - as published by the Appraisal Institute of Canada P.3 - 61.

The 12.65% overall capitalization rate above will provide for recapture of 75% of the investment in 25 years plus a cash flow of 11% per annum on the equity invested."

Mr. Omond also noted that the capitalization rate used in a recent assessment of the Scotia Square complex in Halifax was 11%, that the Toronto Dominion Building in downtown Halifax sold at a capitalization rate of 11.5% and that the Willow Tree Tower, located at the corner of Quinpool Road and Robie Street in Halifax, recently sold at a capitalization rate of 12%. In Mr. Omond's opinion, the 12.65% capitalization rate developed for the subject property is within the general range of capitalization rates for other types of investment properties in the Halifax-Dartmouth area.

In determining the value of leasehold improvements, Mr. Omond estimated the normal life of the leasehold improvements to the space occupied by The Billy Club to be 15 years and their effective age to be one year. He did not allow for any depreciation in the leasehold improvements in the space occupied by Anson Development Ltd. because these improvements were new at the time of his appraisal.

Mr. Omond added $252,268.00 ($270,287.00 x 14/15), the depreciated cost of the leasehold improvements to the area occupied by The Billy Club; $40,575.00, the undepreciated cost of the leasehold improvements to the area occupied by Anson Development Ltd., and $606,040.00, the capitalized net rental value of the property prior to leaseholds to arrive at an estimate of market value using the income approach of $898,883.00 which he rounded to $899,000.00.

Mr. Omond next determined the market value of the subject property at December 31, 1983 to be $922,000.00 using the cost approach which involved estimating the reproduction cost new of the subject building, reducing the reproduction cost for any loss in value due to physical causes, adding the cost of improvements to the premises occupied by The Billy Club and Anson Development Ltd. and adding a value for land and pavement.

Using a model of a two-storey masonry retail store with offices taken from Boeckh's Building Valuation Manual as a guide, Mr. Omond estimated the reproduction cost of the subject building excluding interior finish at December 31, 1983 to be $606,221.00. He estimated the amount of physical depreciation using the "straight line" or "age-life" method. This method involves calculating the ratio of the effective age of the building over the building's economic life and applying that ratio to the reproduction cost of the building. In calculating the physical depreciation, Mr. Omond separated the building into two parts - one part comprising the first and second floor areas and the second part comprising the basement area. When he was determining the effective age of each part of the building, he took into consideration that the building was constructed in three stages in 1950, 1960 and 1972. He estimated the normal life-span of both parts of the building to be 50 years. Mr. Omond calculated the depreciation for the first and second floor to be 44.9% as follows:

"First and Second - 14,308 sq.ft.

	Percentage of Total Floor Area	x	Depreciation Rate	=	Weighted Average
1) 1950 Construction -contribution -	41.6%	x	64% $\frac{(32)}{(50)}$	=	26.6%
2) 1960 Construction -contribution -	25.2%	x	44% $\frac{(22)}{(50)}$	=	11.0%
3) 1972 Construction -contribution -	32.2	x	22% $\frac{(11)}{(50)}$	=	7.3%
TOTAL DEPRECIATION TO FIRST AND SECOND FLOOR				=	44.9%

He calculated the depreciation rate for the basement area at 36.9% as follows:

Basement - 4,387 sq.ft.

	Percentage of Total Floor Area	x	Depreciation Rate	=	Weighted Average
1) 1950 Construction	26.9%	x	64% $\frac{(32)}{(50)}$	=	12.2%
2) 1960 Construction	16.6%	x	44% $\frac{(22)}{(50)}$	=	7.3%
3) 1972 Construction	56.5%	x	22% $\frac{(11)}{(50)}$	=	12.4%
TOTAL DEPRECIATION TO BASEMENT					36.9%

Mr. Omond separated the reproduction cost of the building excluding interior finish ($606,221.00) between first and second floor ($510,274.00) and basement ($95,947.00). The amount of physical depreciation so determined was $264,517.00 consisting of $229,113.00 for the first and second floors (44.9% of $510,274.00) and $35,404.00 for the basement (36.9% of $95,947.00).

By subtracting the physical depreciation of $264,517.00 from the reproduction cost of $606,221.00, Mr. Omond arrived at a depreciated replacement cost for the building before leasehold improvements of $341,704.00. He then added $40,575.00 which was the actual cost of leasehold improvements to the premises occupied by Anson Developments Ltd. and $272,449.00 which was the actual cost of leasehold improvements ($270,287.00) to the premises occupied by The Billy Club and the Police Association of Nova Scotia updated by Boeckh's Time Location Modifier for One Year (January 1, 1983 to December 31, 1983 - $270,287.00 x 1.08 = $291,910.00) less depreciation for one year (1/15th of $291,910.00 = $19,461.00).

Mr. Omond did not include the cost of the service elevators in his estimate of reproduction cost of the building. He said that the elevator was necessary only because of the slope of the land and compensated for a lower land value. Since Mr. Omond did not decrease the land value because of its topography, he did not include the cost of the elevator.

Mr. Omond estimated the land value to be $267,600.00. He arrived at this figure by multiplying the land area (21,408 sq.ft.) by the value per square foot ($12.50). He calculated the land area by multiplying the dimensions stated in the legal descriptions contained in deeds to the property. In estimating the value of the land on per square foot basis, Mr. Omond knew that the former property owned by the Police Association of Nova Scotia on Alderney Drive was expropriated in 1979 for approximately $10.00 per square foot and that land values were increasing in downtown Dartmouth during the period from 1979 to 1983. In his opinion, $12.50 per square foot was a reasonable estimate of the land value as of December 31, 1983 including the paved parking area.

Adding the land value of $267,600.00, the depreciated cost of leasehold improvementsof $272,449.00 and $40,575.00 and the depreciated cost of the building of $341,704.00, Mr. Omond arrived at a market value under the cost method of $922,328.00 rounded to $922,000.00.

In Mr. Omond's opinion, the best method to value the subject property was the market data method because it incorporated the past sale of the property and the actual costs of leasehold improvements. According to Mr. Omond, these elements required little or no adjustments in order to reflect current values.

Mr. Omond stated that the cost method would establish an upper limit of value for the property but that it was the least reliable method of valuation.

Mr. Omond concluded that the income method would only be used if The Billy Club or a similar non-profit club could afford to pay as a rental the sum of the net base rental value of the space presently occupied by the club prior to leasehold improvements plus the amortized value of the leasehold improvements spread over their expected lease period.

In Mr. Omond's opinion the market value of the subject property as of December 31, 1983 was $797,000.00, the market value determined by the direct sales comparison method.

In order to ensure that the subject property was assessed uniformly with other properties in the city for the 1983 assessment year, Mr. Omond multiplied the market value of the subject property by the general level of assessment which he calculated to be .7285% for 1983. The actual general level of assessment for 1983 was not available at the time he prepared his report. Mr. Ormond estimated the general level of assessment for 1983 by "trending" which he described as a type of linear regression analysis. This analysis took into account the general level of assessment for 1980, 1981 and 1982 and by the application of an arithmetic formula which was not provided, he projected the level of the roll for 1983.

Mr. Omond estimated the market value of the subject property as of December 31, 1983 for the 1983 assessment year because he prepared his appraisal report in December 1983, and in his opinion it was "better" to estimate the current market value of the property and then apply the general level of assessment than to estimate the market value of the property as of January 1, 1983 and apply the general level of assessment for 1982.

Mr. Omond estimated the assessed value of the subject property for the 1983 assessment year to be $580,615.00 ($797,000.00 x .7285).

Thomas Mills, N.S.I.A., is the Assistant Director of Assessment for the Dartmouth Assessment Region and he gave evidence respecting the market value and assessed value of the subject property on behalf of the Director of Assessment.

Mr. Mills' final estimate of market value of the subject property as of December 31, 1982 is $1,015,000.00 and his final opinion as to the assessed value for the 1983 assessment year is $818,100.00 (1,015,000 x 80.6% [General Level of Assessment for 1982]).

In arriving at his estimate of market value, Mr. Mills used a cost approach and an income approach. He did not use the direct sales comparison approach because he could not find any properties comparable to the subject which had sold. He did not consider the sale of the shares of Manchester in December 1980 to be an arms-length sale because the shares were not exposed to the market for a reasonable period of time, also he considered the sale of the shares not to be a sale of the real estate and therefore not a reliable indication of the market value of the real estate in December 1980. In Mr. Mills' opinion, the lack of comparable sales made the direct sales comparison approach the least reliable approach to use in valuing the subject property.

Mr. Mills estimated the market value of the subject property using the cost approach as of December 31, 1982 to be $1,020,000.00. He used the same model in Boeckh's Building Valuation Manual as Mr. Omond to cost the subject building. He estimated the reproduction cost for the building, excluding the interior finish, to be $674,919.00. He excluded the interior finish costs from his estimate of costs because the interior of the building was renovated in 1982 and the most accurate method of costing the interior finish was to use the actual costs incurred. The actual cost of renovation for the space occupied by The Billy Club and the Police Association for Nova Scotia was $270,287.00 as of June 1982. Mr. Mills adjusted these costs by a modifier of 1.02 to reflect these costs as of December 1982. The adjusted cost was $275,692.00. Mr. Mills estimated the effective age of the renovations to be 1/2 year and their normal economic life to be 25 years. This results in a depreciation rate of 2% ($\frac{.5}{25}$) and physical depreciation of $5,513.00 (2% of $275,692.00). Subtracting the amount of depreciation of $5,513.00 from the cost of renovation of $275,692.00, Mr. Mills arrived at a depreciated cost of $270,178.00 for leasehold improvements which he rounded to $270,200.00.

Mr. Mills also used the age-life method in estimating the amount of physical depreciation in the rest of the building. He considered the subject building to have a normal economic life of 50 years and an effective age of 15 years which results in a depreciation rate of 30% $\left(\frac{15}{50}\right)$. In arriving at an effective age of 15 years for the building, Mr. Mills considered how well the building stood the passage of time and that the building was renovated in 1971. He was also aware that part of the building was not renovated in 1971. The amount of physical depreciation calculated by Mr. Mills was $202,475.00 (30% of $674,919.00). Subtracting the amount of physical depreciation of $202,475.00 from the reproduction cost of $674,919.00, Mr. Mills arrived at a depreciated building cost, excluding interior finish, of $472,443.00 which he rounded to $472,400.00. Included in this total is the cost of the service elevator at $32,092.00.

Mr. Mills also included as part of the building reproduction cost the actual cost to finish the games room ($6,500.00) and the actual cost of the leasehold improvements to the space occupied by Anson Developments Ltd. ($40,600.00).

Mr. Mills calculated the deprectiated reproduction cost of the subject building to be $789,700.00 as follows:

Depreciated base building costs	$472,400.00
Depreciated cost of leasehold improvements - Billy Club and PANS	270,200.00
Cost of Games Room Finish	6,500.00
Cost of Leasehold Improvements Anson Developments Ltd.	40,600.00
	$789,700.00

In determining the land value of the subject property, Mr. Mills considered the sales of seven properties in the downtown area of Dartmouth. Three of the properties sold in 1981, one in 1982 and three in 1983. All sales included land and building. In each case, Mr. Mills allotted part of the sales price as the value of the building and then deducted that value from the sales price to arrive at an estimated land value. He then divided the estimated land value by the land area to arrive at a price per square foot for the land portion of the property. Five of the seven properties indicated a land value per square foot ranging from $10.64 to $12.97 while the remaining two properties indicated a land value of $27.81 and $34.17 per square foot.

Based on the preceding residual land values per square foot, Mr. Mills estimated the per square foot value of land in the downtown area of Dartmouth as of December 31, 1982 to be $10.50. He calculated the land value to be $226,485.00 (21,570 sq.ft. x $10.50) which he rounded to $226,500.00.

Mr. Mills estimated the value of the pavement in the parking area on Prince Street to be $3,500.00 based on information supplied to him by a paving contractor in the City of Dartmouth.

Mr. Mills' calculation of the market value of the subject property by the cost approach is as follows:

Depreciated Building Value	$789,700.00
Land Value	226,500.00
Pavement Value	3,500.00
TOTAL PROPERTY VALUE	$1,019,700.00
ROUNDED TO:	$1,020,000.00

The second approach used by Mr. Mills was the income approach. According to Mr. Mills the income approach is most applicable when valuing investment real estate. He did not consider the subject property to be a typical investment property. However, in his opinion, a potential purchaser would do an income analysis in deciding what he should pay for the property because part of the property was rented and a potential purchaser would consider the cost of alternative rental accommodation vs the cost of purchasing the property.

Mr. Mills estimated the market value of the subject property by the income approach to be $1,002,000.00 calculated as follows:

Total Potential Net Absolute Rent:		$129,083
Vacancy and Bad Debt (3%)	($ 3,872)	
Effective Income:		$125,210
Expenses:		
Legal, Audit, Management(3%):	($ 3,756)	
Structural Maintenance (5%):	($ 6,260)	
Total Unrechargeable Expenses	$10,016	
Potential Net Income:		$115,194
Capitalization Rate (11.5%):		÷11.5%
Indicated Value December, 1982:		$1,001,686
Rounded:		$1,002,000

Mr. Mills estimated the total potential net absolute rent of $129,083.00 as follows:

"1.	Lounge and Restaurant Area:	6,500 sq.ft.	
	Potential Net Sq.Ft. Rent:	$ 12	
	Total Potential Net Rent	$78,000	$78,000
2.	Administration Office Area:	2,171 sq.ft.	
	Potential Net Sq.Ft. Rent:	$ 8	
	Total Potential Net Rent:	$17,368	17,368
3.	Anson Development Ltd. Contract Rent:	$20,000/yr	
	40% Expense Allowance to Net:	x 60%	
	Potential Net:	$12,000	12,000
4.	Games Room and Remainder Top Floor:	2,529 sq.ft.	
	Potential Net Sq.Ft. Rent:	$ 3	
	Total Potential Net Rent:	$7,587	7,587
5.	Basement Area:	1,880 sq.ft.	
	Potential Net Sq.Ft. Rent:	$ 2	
	Total Potential Net Rent:	$3,760	3,760
6.	Total Monthly Parking Spaces:	36	
	Annual Rent Per Space:	$ 360	
	Total Potential Parking Income:	$12,960	
	20% Expense Allowance to Net:	x 80%	
	Potential Net:	$10,368	10,368
7.	Total Potential Property Income:		$129,083 "

Mr. Mills examined the leases of five tenants to determine rents being paid for restaurants, dining room and lounge premises throughout the City of Dartmouth. The net square foot rent being paid by these tenants were: $6.50, $7.42, $8.00, $9.05 and $14.00 respectively. These rents were mostly for unrenovated space. Since the subject property had been recently renovated, in Mr. Mills' opinion, $12.00 per square foot was a reasonable rental charge for the restaurant, dining room and lounge area of the subject property in its improved condition.

Mr. Mills also examined the leases of seven tenants to determine the rents being paid for office space in the downtown area of Dartmouth. The net square foot rent being paid by these tenants range from $5.58 for unimproved office space to $9.71 for improved office space. Mr. Mills considered $8.00 per square foot to be a reasonable rental rate for office space in the subject property, including renovations.

Mr. Mills allowed a net rent of $3.00 per square foot for the games room because of its poor location and poor accessability. He allowed a rental rate of $2.00 per square foot for space in the basement of the subject property based on a $2.00 rent per square foot being charged for 1700 square feet of storage space in the basement of a building in close proximity to the subject building.

The parking lot and the premises occupied by Anson Developments Ltd. were producing rental income and Mr. Mills used the actual rental income figures for these areas. He allowed a 20% expense allowance for the parking lot income. This rate was obtained from persons who leased parking spaces. A 40% expense allowance was deducted from the Anson Developments Ltd. rental income. This rate was taken from assessment data gathered from investment property owners by the Assessment Department in preparing the annual assessment of investment properties in the City of Dartmouth.

Mr. Mills further reduced the total potential net income of the building by 3% for vacancies and uncollectable rents.

The 3% rate was determined by Mr. Mills after analysis of actual occupancy rates in the Portland Street area of Dartmouth. Mr. Mills also reduced the total potential net income by 3% for management fees and 5% for building maintenance. He stated that as a general rule he uses a 3% management fee for buildings with few tenants and a 5% management fee for building with many tenants. He only allowed 5% for maintenance because the building was in good condition and recently renovated. In cross-examination, Mr. Mills indicated that he used a 5% allowance for management fees and a 10% allowance for maintenance expenses at the Regional Assessment Appeal Court Hearing. Mr. Mills stated that he changed these allowances because he was rushed to prepare a report for the Regional Court hearing and he used the wrong allowances.

Mr. Mills applied a capitalization rate of 11.5% to the total potential net income. A Page 24 of his appraisal report, Mr. Mills states:

> " A capitalization rate is a current earnings ratio often used in valuing income properties. There are a number of different methods of calculating capitalization rates. Market related overall capitalization rates are considered the best rates to use. Mortgage equity rates and remaining life rates are also commonly used in the real estate industry.
>
> As earlier stated the subject property is rather unique. Comparable sales do not exist in order to get an overall capitalization rate from comparison. Sales have been analyzed however in order to establish what overall rates investors are looking for in the municipality.
>
> A mortgage equity rate has also been calculated in order to determine what an investor would be considering if contemplating a purchase at the end of 1982. It is considered that this rate would indicate the upper end of potential capitalization rates."

In attempting to establish what the overall capitalization rate investors were seeking in the City of Dartmouth, Mr. Mills looked at three properties which had recently sold. The first property, known as Lake City Plaza, is a strip shopping and service Mall containing 28,500 square foot of leaseable space. The main tenant is a licensed restaurant occupying 3,500 square feet. The property sold in August 1982 for $1,535,000.00. Mr. Mills determined the capitalization rate for this property to be 11.27%. In determining this capitalization rate, he did not use the property's actual net income at the time of sale, but estimated the property's potential net income. According to Mr. Mills, this property has a good investment history.

The second property, selected by Mr. Mills, was an older home recently renovated to office space, partly owner-occupied and partly leased. This property sold in 1983 for $185,000.00. Mr. Mills estimated the property's potential net income at $21,758.00 and calculated the capitalization rate to be 11.76%.

The third property selected was a three storey walk up office building, exhibiting poor quality construction, poor parking and a poor investment history. This property sold in April 1983 for $127,500.00. The net income of $16,387.00 was established by lease prior to sale of the building. The building was purchased with the intention that the purchaser occupy the building. The indicated capitalization rate calculated by Mr. Mills was 12.85%. According to Mr. Mills, this rate would be the upper range of possible capitalization rates for the subject property.

Mr. Mills calculated a mortgage - equity rate of 12.48% as follows:

> "Formula: R = (M x f) + (E x y)
> Where R = capitalization rate
> M = ratio of loan to value
> f = annual mortgage constant
> E = ratio of equity to value
> y = equity dividend rate
>
> R = (.80 x .138468 + (.20 x .07)
> = (.1108) + (.0140)
> = .1248
> OR 12.48%"

He used a mortgage rate of 14% with a lending ratio of 80% of value. According to Mr. Mills, mortgage rates for commercial money were in the vicinity of 13.5% to 14.5% in December 1982. Mr. Mills stated an equity dividend rate of 6% to 8% was expected for this type of investment.

According to Mr. Mills, the subject property would be a good investment property. Based on the range of capitalization rates established from the above sales, and the mortgage equity rate calculation, he concluded that 11.5% was a reasonable capitalization rate to apply to the net income of the subject property.

At Page 28 of his Appraisal Report, Mr. Mills states:

> " Value by cost approach: $1,020,000
>
> Value by income approach: $1,002,000
>
> As indicated earlier in this report, this property is rather unique to the area. No market date of comparable properties exists in order to do a direct market comparison approach to value.
>
> Considering the drawbacks within the income approach in establishing rents by comparison and a capitalization rate without good market comparables the least weight should be given to this value indication. The cost approach is based upon more

> solid and reliable data. Within the marketplace, however, this approach is not likely to be used alone.
>
> Tempering the cost approach with the income approach it is my opinion that the market value of the subject as of December 1, 1982 is One Million Fifteen Thousand Dollars ($1,015,000.00)."

Mr. Mills applied the general level of assessment of 80.6% to the market value of $1,015,000.00 to arrive at an assessed value of $818,100.00 for the subject property for the 1983 assessment year. He calculated the general level of assessment for 1983 to be 80.6% by dividing the total of the assessed values of all properties which sold in the City of Dartmouth in the year 1982 by the total of their sales value.

Both Mr. Omond and Mr. Mills used more than one method to estimate the market value of the subject property. Each method used resulted in a different estimate of market value. The Board must decide which method or methods will give the most reliable estimate of market value for the subject property.

Counsel for Manchester submits at page 2 of his Post-Hearing brief that "a fundamental flaw in the approach to value taken by Mr. Mills, is that he gave no weight to the purchase in December, 1980, or to the assessed values of the property from 1979 to 1982, although the assessed values were based on the Director of Assessment's determination of market value for those years". With respect to the purchase of the shares of Manchester in December, 1980, Counsel for Manchester submits that:

"The form of the transaction does not make it

> irrelevant because the purchaser was basically buying the subject building".
>
> Counsel for the Director submits that:
>
> "The purchase in December, 1980, was a purchase of a company and not a purchase of the real property".

He argues that collateral benefits such as income tax considerations were at play making the $400,000.00 figure misleading and unsuitable as a base for calculation of the present market value of the subject property.

In the opinion of the Board, the direct sales comparison method used by Mr. Omond does not produce a reliable estimate of market value in this instance. The point emphasized by Mr. Omond and Counsel for the Appellant is that the Appellant was really buying the land and building when it acquired the shares of Manchester in December, 1980, and that the total consideration for the land and building was approximately $400,000.00. However, they have completely ignored the fact that the Vendor shareholders were not selling the land and building but the shares in the Company which owned the land and building. A few months prior to December, 1980, Manchester refused to sell the land and building to The Billy Club for $500,000.00.

The Board recognizes that the sales price paid for all of the shares of the Company should reflect the value of the Company's assets including land and buildings. However, a determination of the market value of particular assets, such as land and buildings, from the price paid for the Company's common shares requires not only a detailed valuation of the assets and liabilities of the Company other than land and buildings but an examination of all other matters which influence the price agreed to by the Vendor and the Purchaser. In this instance, there was insufficient evidence adduced by the Appellant relating to the matters which influenced the price agreed to by the Vendors for the sale of the shares of Manchester to enable the Board to conclude that $400,000.00 is a reliable estimate of the market value of the land and building in December, 1980.

The Board also rejects the estimates of market value determined by the income method. Both Mr. Omond and Mr. Mills recognized the difficulties in using the income method with the subject property. Although a small part of the property is rented, it is not the typical investment type property which lends itself to valuation by the income method. This was evident in the difficulties Mr. Omond and Mr. Mills had in attempting to find comparable market data on rents and capitalization rates for the subject building.

Mr. Omond stated at page 62 of his appraisal report:

> "There was no available rental data involving building or space of this type and finish and use in Dartmouth".

Despite this, Mr. Omond estimated a market value by the income method. The method used by Mr. Omond was to estimate the rental potential of the subject building from general retail and office buildings similar to the subject building before it was renovated by The Billy Club, capitalize that rental potential and then add the value of the leasehold improvements by The Billy Club to arrive at a final estimate of market value by the income method. In the opinion of the Board, the method and market data used by Mr. Omond were inappropriate and not reliable for this property. The method used by Mr. Omond does not result in a reliable estimate of the rental potential of the building as it presently exists. It does not take into account the fact that the rental market for retail space and the rental market for restaurant and lounge space may be completely different.

Also the capitalization rate used by Mr. Omond was based entirely on the "band of investment theory" with nothing in the way of market derived capitalization rates from the sale of properties comparable to the subject property.

The Board does not accept Mr. Mills' estimate of the net rental potential of the subject property because he was not able to support with market data his estimate of a rental rate of $12.00 per square foot for renovated space used for restaurant, dining room and lounge facilities. The rental information used by Mr. Mills related to unrenovated space. Although this information was of some assistance to him, his final estimate of a rental rate of $12.00 per square foot for renovated space appears to be a subjective estimate on his part.

The Board also doubts the reliability of the capitalization rate determined by Mr. Mills. None of the properties chosen by Mr. Mills to help determine a capitalization rate could be considered comparable to the subject property. Also, Mr. Mills' selection of three investment properties with varying degrees of risk is insufficient to establish a reliable estimate of the range of overall capitalization rates investors are looking for in the City of Dartmouth and therefore insufficient to establish a reliable capitalization rate for the subject property.

The Board recognizes that Mr. Omond and Mr. Mills were trying to estimate a market value for the subject property by the income method in the absence of market data on comparable rents and capitalization rates. Both have a great deal of experience in the appraising and assessing of real property, yet there were substantial differences in their estimates of the rental potential of the subject property and the appropriate capitalization rate. In the opinion of the Board, there is such a wide difference in their estimates because there are no comparable properties or sales from which to get reliable rental figures or capitalization rates. The Board therefore rejects the estimate of market value by the income method because there is not sufficient reliable income data available to determine a reliable estimate of market value of the subject property.

The final method of valuation used by Mr. Omond and Mr. Mills was the cost method. This method has been approved as a generally accepted method of valuation by the Appraisal Institute of Canada and has been approved by the Supreme Court of Canada as an acceptable method to determine the market value of property for assessment purposes in certain cases (Montreal v. Sun Life Assurance Company of Canada, 1952 2 D.L.R., 81).

In the opinion of the Board the cost method is an appropriate method to value the subject property because the property, which is owner-occupied, is designed to meet the owner's particular needs and a large part of the building is devoted to a service type use which is often valued by the cost method. With a few exceptions, there appears to be general agreement by Mr. Omond and Mr. Mills on the reproduction costs of the building. Also estimating the amount of functional and economic obsolescence is not a problem in this instance because, with the exception of the disagreement on the usefulness of the elevator, both Mr. Omond and Mr. Mills agreed the subject property did not have a functional obsolescence or economic obsolescence.

Both Mr. Omond and Mr. Mills estimated the reproduction cost of the building in the same manner. They estimated the cost to reproduce the superstructure and basement of the subject building from Boeckh's Valuation Manual and added the actual cost of renovations to the interior of the building which was completed by the Appellant in 1982. They agreed that the actual cost of renovations to the interior of the building as of June, 1982, was $317,387.00 consisting of $270,287.00 for the space occupied by The Billy Club and PANS, $40,600.00 for the space occupied by Anson Development Limited and $6,500.00 for the games room.

Mr. Omond estimated the reproduction cost of the superstructure and basement before applying a time-location modifier to be $415,220.00 while Mr. Mills estimated this cost to be $458,792.00, a difference of $43,572.00. The time-location modifier is a costing index applied by Boeckh to update the costs shown in its costing manuals. Approximately 50% or $21,815.00 of the $43,572.00 is the cost of the service elevator which Mr. Omond did not include in his estimate of reproduction costs. The balance ($21,757.00) results from differences by Mr. Omond and Mr. Mills in their estimate of the costs of partitions, ceiling finish, basement heating equipment, the basement floor and the exterior wall. In the opinion of the Board, the service elevator is part of the building, is being used and adds value to the building and its costs ($21,815.00) should be included in the reproduction cost of the building. In the opinion of the Board, the cost of the remaining items ($21,757.00) could have been resolved by the parties. The Board agrees with the evidence of Mr. Omond with respect to costs of the exterior wall and basement heating equipment and with the evidence of Mr. Mills with respect to the remaining differences. Mr. Omond's estimate of the costs for exterior walls and basement heating equipment is approximately $11,000.00 less than Mr. Mills estimate.

The Board therefore determines that the reproduction cost of the superstructure and basement before applying a time-location modifier is as follows:

Reproduction costs per Mr. Mills	$458,792.00
Less: Cost of exterior walls and basement heating equipment	11,000.00
TOTAL:	$447,792.00

In order to determine the reproduction costs of the superstructure and the basement as of December, 1982, a time-location modifier of 1.38 is applied to the above costs. Architect fees of 6.6% of the adjusted reproduction cost is added to get the final estimate of reproduction cost of the subject building as of December, 1982.

The Board calculates the reproduction costs of the superstructure and the basement as of December, 1982, as follows:

Reproduction costs before modifier;	$447,792.00
Time-location modifier	1.38
Adjusted sub-total	617,953.00
Architects fees (6.6% of $617,953.00)	40,785.00
Replacement costs of subject building - December, 1982	$658,738.00

The Board agrees with Mr. Mills and Mr. Omond that the reproduction costs of the interior of the building should be the actual costs incurred by the Appellant. These costs totalled $317,387.00 and the renovations were completed during the year 1982. Since the subject building is being valued as of December, 1982, the Board accepts the sum of $317,387.00 as the reproduction costs of the interior finish. The Board does not allow anything for physical depreciation since the renovations are new as of the effective date for valuing the subject building for assessment purposes.

Mr. Omond and Mr. Mills disagree on the rate to be applied to measure the amount of physical depreciation to the building's superstructure and basement. Mr. Mills would apply a rate of 30% to the reproduction cost of the superstructure and basement while Mr. Omond would apply a rate of 44.9% to the reproduction costs of the first and second floors of the building and a rate of 36.9% to the reproduction costs of the basement.

Mr. Mills rate of 30% was based on the assumption that the basic building which included the frame, roof, sub-floors and mechanical components was completely rebuilt in 1971. Mr. Omond's method of determining physical depreciation took into account the fact that the building additions in 1950 and 1960 were not renovated in 1971. Since part of the building was not renovated in 1971, in the opinion of the Board, the approach used by Mr. Omond provides a better indication of the amount of physical depreciation of the basic superstructure and basement of the building than Mr. Mills' estimate.

The Board is not able to precisely allocate the reproduction costs of the basic building ($658,738.00) between the first and second flocr area and the basement area for depreciation purposes as was done by Mr. Omond. This is due partly to the fact that Mr. Omond's reproduction costs were calculated as of December, 1983, and the costs used by the Board were costs as of December, 1982. Also, the Board added some costs not included by Mr. Omond. Although Mr. Mills' costs were calculated as of December, 1982, he did not provide the Board with a breakdown of his costs between the first and second floor and basement areas. Mr. Omond's allocation of the total reproduction cost of the basic building was approximately 84% for the first and second floors and 16% for the basement. For the purposes of determining physical depreciation the Board allocates 84% of the total reproduction cost of the basic building ($658,738.00) or $553,340.00 to the first and second floor and 16% or $105,398.00 to the basement.

The Board calculates the amount of physical depreciation as follows:

First and Second Flocr ($553,340.00 x 44.9)	$248,450.00
Basement ($105,398.00 x 36.9)	38,890.00
TOTAL: Physical depreciation	$287,340.00

The Board calculates the depreciated reproduction costs of the subject building as follows:

Reproduction costs of the basic building	$658,738.00
Less depreciation	287,340.00
Depreciated replacement cost of basic building	371,398.00

Reproduction costs of building interior	$317,387.00
Depreciated reproduction costs of building	$688,785.00
Rounded to:	$688,785.00

The Board accepts Mr. Mills estimate of land value ($226,500.00) and paving costs ($3,500.00). In the opinion of the Board, Mr. Mills' estimate of land value is more reliable than Mr. Omonds' because his estimate is based on a more detailed analysis of property sales in the downtown area of Dartmouth.

The Board determines the market value of the subject property under the cost method to be $918,800.00 as follows:

Depreciated building value	$688,800.00
Land value	226,500.00
Pavement	3,500.00
TOTAL:	$918,800.00

The Board determines the assessed value of the subject property for the 1983 assessment year to be $740,000.00 by applying the general level of assessment (80.6%) to the market value ($918,800.00) rounded.

The next issue to be considered relates to the matter of whether The Billy Club should be exempt from business occupancy assessment pursuant to Section 25B(1) of the Assessment Act for that portion of the property known as Civic #16 Portland Street, Dartmouth, occupied by it. The Regional Court determined that The Billy Club was exempt.

The Director set out the following grounds of appeal in his Notice of Appeal filed as Exhibit M-2, namely:

> "(1) The Dartmouth Regional Assessment Appeal Court erred in law and in fact by striking the Respondent from the assessment roll.
>
> The Dartmouth Regional Assessment Appeal Court erred in law in failing to hold the Respondent assessable for business occupancy tax pursuant to the Assessment
>
> The Regional Assessment Appeal Court erred in law in holding that the Respondent was a fraternal organization within the meaning of the Assessment Act.
>
> The Regional Assessment Appeal Court erred in law in holding that it was bound by the decision of the Nova Scotia Supreme Court in Pans Social and Recreation Club and Director of Assessment of the City of Dartmouth Assessment Region dated the 17th day of May 1979."

The grounds of appeal set out in the Notice of Appeal by the City filed as Exhibit M-3 were identical to the grounds of appeal set out in the Director's Notice of Appeal.

That portion of the decision of the Regional Assessment Appeal Court which deals with the exemption issue reads as follows:

> " There was a primary argument as to whether or not the type of functions and the classifications of membership that The Billy Club had, moved it out of the provisions of Section 25(2)(b) of the Assessment Act. Mr. Mills and Mr. Keefe, in their argument and evidence, felt that The Billy Club was operating a commercial enterprise that was not consistent with its status as a fraternal organization incorporated under the Societies Act.
>
> Mr. Ross, the Executive Director of the Police Association of Nova Scotia, on the other hand felt that the type of functions that were carried out by the Association were consistent with its status. He gave a detailed analysis of the membership both in terms of policemen, service people and members at large, and the type of functions for recreational and social activities that were carried on for the Club.
>
> The cases presented by both sides were most useful for the Court in coming to its decision. It is

> the Court's feeling that the Club, as a society, is entitled to carry out certain commercial enterprises in order to raise revenue to better foster its objects of incorporation and the Court is satisfied that none of the activities as carried out by the Club is of such a commercial nature that it would remove it from the exemption granted under the Assessment Act.
>
> In view of the previous decision of our Courts with respect to the Police Association given on May 17, 1979, the Court feels itself bound firstly by this decision to exempt the Club from business occupancy assessment and secondly based on the evidence as adduced by Mr. Ross, the Court is further satisfied that the nature of activities conducted by The Billy Club does not remove it from its exemption as provided by the statute. Accordingly, it is the Court's decision that the Police Association of Nova Scotia (The Billy Club) is exempt from business occupancy assessment."

There is very little disagreement among the parties about the relevant facts.

The PANS Social and Recreation Club was incorporated under the Societies Act on September 13, 1972. Its name was changed to The Billy Club on August 13, 1982.

The Memorandum of Association of The Billy Club dated September 11, 1972, filed as Exhibit M-10 states in part that:

> "The objects of the Society are:
>
> (a) to organize and promote social and recreational activies for and behalf of the members.
>
> (b) to exercise the powers vested in the Society by the Societies Act, R.S.N.S. 1967, Chapter 286."

The By-laws of The Billy Club were filed as Exhibit M-11. The By-laws provide for two types of membership. Section 5 of the By-laws state that:

> "(5) Any person, without regard to race, creed, or colour, who is or has been a member of the Police Association of Nova Scotia or is or has been engaged in police, security work or law enforcement in the Province of Nova Scotia, is eligible for membership."

Section 5A reads as follows:

> "5A Any person, other than mentioned in By-Law 5, shall be eligible to apply to be an associate member of the Society. (November 20th, 1978)"

According to Mr. Ross, the "full members" of the club are members of the Police Association of Nova Scotia whose membership is automatic and who do not pay any membership fee. Mr. Ross also said that members of all police forces in Nova Scotia are eligible for "full membership" without paying a membership fee and may become "full members" by making application. Persons applying for associate membership must be sponsored by two members who may be either full or associate members. Associate members pay a yearly membership fee of $15.00. According to Mr. Ross, as of January 1, 1983, there were approximately 550 full members and 3,5000 associate members.

Section 12 of the By-laws provide for the right to participate in the operation of the club and that section reads as follows:

> "(12) Only members present are entitled to vote at a meeting and each member of the Society is entitled to one vote on a motion, resolution or question put to the meeting. Associate members shall not be entitled to vote or hold the position of an officer or be on the executive of the Society. Associate members are not entitled to notice of meetings of the Society or the Society Executive but may attend such meetings and are entitled to speak at such meetings on matters of interest to Associate Members. (Amended November 20, 1978)."

There are no shares issued to any of the members and there is no provision for dividends to members. Section 47 of the club by-laws provides for the distribution of the club's assets on dissolution as follows:

> "(47) Upon the final dissolution of the Society, the net assets if any, after payment of all debts, liabilities and taxes of the Society, shall be divided equally among all members of the Society. Associate members shall not be entitled to any share in the assets of the Society upon dissolution. (November 20th, 1978.)"

According to Mr. Ross, the club needs the revenue generated from membership fees and liquor and food sales to members and their guests to be able to survive. Mr. Ross estimates that approximately 10% to 15% of the full members and approximately 10% of the associate members regularly use club facilities. Each member is entitled to bring five guests to the club at any one time. The club manager is also entitled in his discretion to permit access to any number of persons. The price charged for beer and liquor is similar to the price charged by local lounges. The club also caters to large groups.

Access to the club is controlled by an electronic door requiring the insertion of a membership card before the door can be opened. Staff also try to ensure that non-members other than guests are excluded.

The club has seventeen full-time employees including a manager, an assistant manager, secretary, controller, janitor, three cooks, four waitresses, a head bartender and four other bartenders. The club is licensed as a private club by the Liquor Licensing Board.

The area of the building occupied by the club is designed primarily for dining, drinking and dancing. The first floor has a quiet lounge, known as Sam Brown's Belt, containing a small bar, TV and Video Games. This lounge is open from 11:00 A.M. to 1:00 A.M. every day of the week except Sunday, when it is opened from 12:00 noon to 10:00 P.M. Food and liquor are served in this lounge, although the food menu is limited to four items.

The first floor also has a large dining room, known as Sherlock's, which is opened from 5:30 P.M. to 10:00 P.M. Monday to Thursday and from 5:30 P.M. to 11:00 P.M., Friday and Saturday. There is also a large lounge area on the first floor known as The Billy Club Lounge. This area is used to serve lunches from 11:30 A.M. to 2:30 P.M., Monday to Friday; from 4:00 P.M. to 7:00 P.M. Friday and from 12:00 Noon to 3:00 P.M. Sunday. It is also used to show movies on Monday evening, for organized card games on Tuesday evening and dances on Wednesday, Friday and Saturday evenings.

The remaining areas of the building occupied by The Billy Club include kitchen facilities on the first floor and offices for club management and staff on the second floor and a games room on the second floor. The games room containes twelve dart boards, a ping-pong table, table and chairs for games of crib and blackgammon and on occasion, video games. According to Mr. Ross this room is not utilized very much. The club organizes dart tournaments monthly and sponsors an associate member ladies softball team.

The financial statements of the club for 1982 were introduced as Exhibit M-15. The financial statements indicate that the revenue from food and liquor sales was $474,774.00 in 1982 and $377,198.00 in 1981 and the gross profit on these sales was $147,395.00 in 1982 and $108,895.00 in 1981. Other revenue included membership fees of $47,558.00 in 1982 compared to $27,879.00 in 1981 and rent of $24,533.00 in 1982 compared to $12,000.00 in 1981. Receipts exceeded disbursements by $2,486.00 in 1982 and disbursements exceeded receipts by $22,116.00 in 1981. According to Mr. Hornby, the club budgets each year to break even on its operations. At December 31, 1982, The Billy Club had an accumulated operating surplus of $353,676.00. It also owed $138,404.00 to PANS which represented accrued advances to the Club. There are no specific terms for repayment of this sum and there is no interest being charged on the debt.

In 1978 the Club was assessed for business occupancy. The Club made application by way of Originating Notice to the Supreme Court of Nova Scotia for a determination as to whether it was exempt from business occupancy assessment pursuant to Section 25B(1) of the Assessment Act. Subsequent to the application, Counsel for the Director of Assessment for the Dartmouth City Assessment Region advised Counsel for the Club that the Director would not oppose the application. Accordingly, Counsel for the Club appeared before Mr. Justice MacIntosh of the Supreme Court of Nova Scotia unopposed and was granted an order stating that the Club was not assessable for business occupancy with respect to the premises occupied by it and that the 1978 business occupancy assessment was null and void. The Club was not assessed for business occupancy assessment from 1978 to 1982.

Mr. Mills stated that he assessed The Billy Club for business occupancy assessment in 1983 because the club occupied commercial property and it did not fit any of the categories exempted from business occupancy assessment in Section 25B(1). Mr. Mills stated The Billy Club was primarily a social club with a substantial commercial operation.

The relevant portions of the Assessment Act are Sections 7(1) and Section 25B(1) which read as follows:

> "Section 7(1) In addition to any assessment of property under this Act, every person occupying or using any commercial property except
>
> (a) forest property;
>
> (b) structures other than buildings, not providing shelter for people, plant or moveable property, and all machinery, equipment, apparatus and installations other than those for providing services to buildings, whether or not the same are affixed to land and buildings;
>
> (c) property of a municipal water utility, occupied by the utility;
>
> shall be assessed for a sum to be called "business occupancy assessment"."

> "Section 25B(1) Persons occupying property for the purposes of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution shall not be assessed for a business occupancy assessment."

Counsel for the Director submits that The Billy Club is not exempt from business occupancy assessment pursuant to Section 25B(1) because it does not have for its primary function one of the activities set forth in this section. He argues that The Billy Club at best, is a social organization, not a recreational or fraternal organization.

Counsel for the Director argues there is a difference between social organizations and recreational organizations. He concedes that some dictionaries define "recreation" as including drinking and dining but he submits that that definition of recreation is archaic. He refers the Board to a more modern definition of the word "recreate" found in Houghton Mifflin Canadian Dictionary of English Language - "to import fresh life to; refresh mentally or physically," and the word "recreation" - "refreshment of one's mind and body after labour through diverting activity, play."

He also refers the Board to two definitions of the word "social". The first definition which is found in the Houghton Mifflin Canadian Dictionary of the English Language reads as follows: "providing occasion for conversation and conviviality" and the second definition is found in the Oxford English Dictionary which reads as follows - "marked or characterized by mutual intercourse, friendliness or congeniality, enjoyed, taken, spent, etc., in company with others, especially with those of a similar class or kindred interest - consisting or composed of persons associated together, in, or for the purpose of, friendly intercourse."

At Page 9 or 10 of his post-hearing brief, Counsel for the Director submits that;

> " Section 25B was enacted by the Legislature in 1977 (Chapter 22, Section 9). Therefore, the intention of the Legislature was to use the term in its modern meaning, not middle English. Since the middle ages, "recreation" has become more specialized, presumably with the expansion of leisure time and opportunities. It is now necessary

> to distinguish between occupations of a purely social nature and those of a more physical kind (which need not be competitive in the sense imparted by the word "sporting"). It is submitted that it is this narrower, more specialized, meaning of recreational that the Legislature intended to impart.
>
> The Legislature clearly distinguishes between social and recreational. For example, societies can be incorporated for any one of a number of activities including "....social, professional, recreational, sporting or any other useful object...." (Societies' Act, R.S.N.S. 1967, c.286, s.2(1))."

And at Page 11:

> In short, it is submitted that the Legislature, in granting an exemption from business occupancy assessment, intended that not all societies qualify, and that, in particular, social organizations of a non-fraternal nature and professional groups pay a business occupancy assessment like any ordinary occupier of commercial property."

Counsel for the City submits that The Billy Club is not a non-profit organization as was intended by the Societies Act because its main activity is business oriented since it runs a restaurant and lounge operation in direct competition and in like manner to other downtown Dartmouth establishments.

Counsel for the City also submits that The Billy Club is not a recreational club because first, it is not a club as there is no more common purpose or communal spirit found at The Billy Club than at any other regular drinking establishment and secondly, the primary function of The Billy Club is to provide an eating and drinking establishment for the general public and the activities conducted on the premises can be more aptly characterized as "social" rather than "recreational".

Finally Counsel for the City submits that the intention of the legislature in enacting Section 25B(1) of the Assessment Act was to free certain organizations from the burden of taxation because of the benefit to the community and the providing of activities which might otherwise be a burden on the municipality. She argues that the section does not contemplate an operation such as the one carried on at The Billy Club.

Counsel for The Billy Club submits that the club is exempt from business occupancy assessment pursuant to Section 25B(1). He submits that The Billy Club is a "non-profit organization" based on the following facts:

> "(a) It is incorporated as a Society and prohibited from carrying on any trade, industry or business and prohibited from having any shares or dividends.
>
> (b) The Memorandum and By-Laws of the Respondent show that the purpose of the Respondent is to provide social and recreational activities for members and that there is no share structure or provision for dividends.
>
> (c) The actual activities carried on by the Respondent Club are primarily for the social and recreational benefit of its members except to the extent that other incidental activities occur. Such incidental activities so that the Club can survive include leasing extra space to Anson Developments Limited. Incidental purposes should not be allowed to detract from the preponderating purpose of the Club which is to provide social and recreational activities for members.
>
> (d) Some aspects of the Club operation which might give it the appearance of being similar to a commercial operation such as the Club leasing space to Anson Developments; appearing to be somewhat competitive with commercial beverage and food operations; having a menu on the street amounts to applying the so called "commercial activity test" rejected by the Supreme Court of Canada and fails to take into account that the preponderate purpose of the Club is a non-profit recreational club."

He also submits that the club is properly characterized as being a "recreational organization". At Page 12 and Page 13 of his post-hearing brief, he explains why The Billy Club can be considered a recreational organization.

> "Recreate" is defined in the Concise Oxford Dictionary 1964 as follows at page 1035:
>
> recreate, v.t. & i (Of pastime, relaxation, holiday, employment, etc., or refl. of person indulging in them) refresh, entertain, agreeably occupy, (it - ates him to invent histories for his neighbours; - ates himself with cricket, climbing, lying in a hammock, political argument); amuse oneself, indulge in - ation.
>
> and "recreation" is defined in the Grosset Webster Dictionary, New York, 1974 at page 478 as follows:
>
> recreation, n. Diversion; amusement.
>
> It is submitted that "recreational" and "social" have different but overlapping meanings. It is submitted that all "social" activities are "recreational" activities but that some "recreational" activities are not "social" activities.
>
> It is submitted that the attempt to draw a distinction between social clubs and recreational clubs by the Director of Assessment cannot be sustained.
>
> First of all, it is submitted that the object of Section 25B is to make non-businesses not assessable for business occupancy assessment. It is common sense, that non-businesses should not have to pay business occupancy assessment and it is submitted that Section 25B is really just a definition of non-businesses.
>
> The suggestion by the Director of Assessment that the object of Section 25B was to "encourage activities that would otherwise not exist or would exist in very much reduced form." would be to read in words into Section 25B which are not there. In this regard, it is significant that exemption from taxation (as opposed to non-assessability as in this case) under Section 3 (1)(wb) is expressly confined to organizations that provide "a service that might otherwise be a responsibility of the council".

> The absence of express words in Section 25B recognizing the purpose suggested by the Director of Assessment means that no such purpose was intended.
>
> It is submitted that "recreational" merely means that which one does in his leisure time rather than out of a sense of duty or obligation such as in one's business. The attempt by the Director of Assessment to restrict "recreational" to only certain types of leisure time activity is to read into Section 25B restrictions on the word "recreational" which are not in the section. The Director of Assessment says that a distinction has to be drawn between social activities and physical activities and that only the later are meant by the word "recreational".
>
> It is submitted that the word "sporting" was included in Section 25B to include physical activities and that the word "recreational" was expressly included to include non-physical activities such as that of a social club.
>
> In any event, it is submitted that the only activities which go on at the Club are not confined to eating and drinking. A large portion of the activities involve eating and drinking but there is also a games room which is open to members seven days a week and there are movies shown every Monday night, there is a social card night on Tuesdays, dancing on Wednesdays, Fridays and Saturdays and various sports teams comprised of Club members."

Counsel for The Billy Club also submits that the Director and the City are estopped from denying that the club is exempt from business occupancy assessment pursuant to Section 25B(1) of the Assessment Act because of the order of the Supreme Court of Nova Scotia dated May 17, 1979 exempting the club from business occupancy assessment pursuant to Section 25B(1) for 1978 and which was consented to by Counsel for the Director of Assessment for the Dartmouth City Assessment Region.

Counsel for The Billy Club also submits that burden lies upon the Appellants to show on the balance of probabilities that The Billy Club is not assessable for business occupancy assessment because of the decision of the Regional Assessment Appeal Court and because of the order of the Supreme Court of Nova Scotia dated May 17, 1979.

Counsel for the Director and the City submits that the 1979 Supreme Court Order was unopposed and that the Court did not have the benefit of argument. They also submit that the assessment and decision in respect of assessments pertain only to the year they are made and that the Supreme Court order of May 17, 1979 dealt with the 1978 assessment and not the 1983 assessment.

The Board is of the opinion that the Director and the City are not estopped from claiming that the Club is not exempt from business occupancy assessment pursuant to Section 25B(1) for 1983 because the order of the Supreme Court of Nova Scotia dated May 17, 1979 concerned the 1978 business occupancy assessment of The Billy Club, then known as PANS Social and Recreation Club. The Board also is of the opinion that since the 1979 Supreme Court Order was unopposed and no evidence was presented to the Court, the Board should determine whether The Billy Club is exempt from assessment pursuant to Section 25B(1) on the basis of the evidence presented at the current hearing.

The law is clear in Nova Scotia that a taxpayer seeking an exemption from taxation has the burden of establishing that he is entitled to the exemption claimed. In the Governors of Acadia University v. Town of Wolfville (1971), 29 D.L.R. (3d) 441 at Page 444, Coffin, J.A. speaking for the Appeal Division of the Nova Scotia Supreme Court stated that:

> "there is a burden on a party claiming an exemption from taxation to 'bring himself clearly within the four corners of the exonerating clauses of the legislation'..... 'the principle is not only well settled, but rests upon obvious considerations, that those who advance a claim to special treatment in such matters must show that the privilege invoked has unquestionably been created'. Indington, J., in Rutherian Catholic Mission v. Mundare School District [1925] 1 D.L.R., 1055 at p.1058, took the same

> position: 'an exemption from taxation should never be carried further than what is beyond the clearly expressed intention of the legislature.....'."

In the case of Nova Scotia Barristers Society v. Director of Assessment (1980) 46 N.S.R. (2d.) 403 at page 414, MacIntosh J. of the Trial division of the Nova Scotia Supreme Court in discussing Section 25B(1) stated that:

> "To qualify for exemption under s. 25B(1) the organization or institution must have for its primary function one of the activities set forth in the section. When these activities are only incidental to the main function then the exemption is not available. The Society has not brought itself 'within the four corners of the exonerating clauses of the legislation'."

The Board has also considered Section 25B(1) in the appeal of Halifax Civic Workers Social and Benefit Club a decision dated December 21, 1983 and reported in Volume 2 Page 322 of the Board's Reports. At Page 341 the Board stated:

> "It is the Board's opinion that the word "non-profit" is an adjective qualifying each of the enumerated uses following, that is "community, charitable, fraternal, educational, recreational, religious, cultural or sporting." Therefore to qualify for the exemption from business occupancy assessment under Section 25B(1) an organization or institution must be first of all non-profit and must also have as its primary purpose one of the enumerated uses."

The Board is of the opinion that in order for the Club to be a non-profit organization, it must be organized and operated primarily for any purpose except profit and no income may be payable to or otherwise made available to the members.

The Club is incorporated under the Societies Act and is by its statutory nature a "non-business" type of organization. The object of the Club is the organization and promotion of social and recreational activities for and on behalf of the members. The Club is prohibited by the Societies Act from carrying on any business, having a share structure or declaring dividends during its existence.

In fact, the Club is organized into two classes of membership, "full members" and "associate members", and different rights attach to each class of membership. Only "full members" have a say in the management and operation of the Club and only "full members" are entitled to receive a proportionate share of the net assets of the Club on dissolution.

The "full members" cannot sustain the present Club operations by themselves. The "associate members" comprise 86% of the total membership of the Club and the "full members" only 14%. Most of the Club's revenue is derived from "associate members" and their guests in the form of membership fees and food and liquor sales. In the opinion of the Board, the Club is organized primarily to profit or benefit the "full members". The "full members" benefit during the existence of the Club because facilities are provided which otherwise would not be available and they benefit on dissolution of the Club when net assets are distributed proportionately to only them. At December 31, 1982, the accumulated operating equity of The Billy Club was $353,676.00.

The Board is of the opinion that the Club's primary activity is the carrying on of a restaurant and lounge business. The Club is carrying on a business because its primary activity, which is the provision of dining and drinking facilities, is in direct competition with taxable dining and drinking establishments in the City of Dartmouth. Its primary activity takes place on a full time basis and it employs a full time staff of seventeen persons. An examination of the financial statements of the Club for 1981 and 1982 indicates the sale of food and liquor regularly earns a gross profit in the vicinity of 30%. The Club's food and liquor services are made available to persons other than members and guests. The Club has such a high percentage of its membership as associate members and there is no apparent restriction on who can be an associate member, that in effect, the Club is providing a dining and drinking establishment to a fairly large segment of the general public.

In the opinion of the Board, the preponderant purpose of The Billy Club is the carrying on of a business and the making of a profit and it therefore cannot be considered a non-profit organization for the purposes of Section 25B(1).

The Board is also of the opinion that the Club does not have as its primary function one of the activities enumerated in Section 25B(1).

The submission of Counsel for The Billy Club that "recreational merely means that which one does in his leisure time rather than out of a sense of duty or obligation is too wide an interpretation of that word. If the submission of Counsel for the Club is correct, then anything one does in their time away from work would be considered recreational. The primary activity of the Club is the provision of restaurant and lounge facilities for dining and drinking. There are some ancillary activities, such as, movies, dances, card games and the use of a games room but these activities are secondary to the main activity of dining and drinking. In the opinion of the Board, the primary activity of the Club is more of a social activity than a recreational activity.

The Board, after considering the evidence, finds that The Billy Club is not a non-profit organization or institution and its main purpose is social, which is not one of the activities exempted from business occupancy assessment pursuant to Section 25B(1). The Board therefore determines that The Billy Club is not exempt from business occupancy assessment pursuant to Section 25B(1) of the Assessment Act.

The Board does not have sufficient evidence to enable it to determine The Billy Club's business occupancy assessment for 1983. The Board will re-convene the hearing for the sole purpose of hearing evidence from the parties on the appropriate amount of business occupancy assessment for The Billy Club for 1983. In the meantime the Board suggests that the Director, the City and The Billy Club attempt to agree on the appropriate amount of business occupancy assessment in light of the Board's decision on valuation of the commercial property.

At the conclusion of the re-convened hearing, the Board will hear the parties on costs.

An Order will issue after the Board determines the appropriate amount of business occupancy assessment and the question of costs.

DATED at HALIFAX, Nova Scotia, this 19th day of March, 1985.

R.H. BLOIS, Q.C.

ELIZABETH LAWRENCE

DARRYL W. WILSON

Estate of Sabine v. Director of Assessment

ASSESSMENT--RESOURCE PROPERTY--OWNERSHIP--ASSESSMENT ACT, SS.32, 33(1)

This is an appeal from a decision of the Annapolis-Digby Regional Assessment Appeal Court confirming the 1984 assessment of the Appellant's 11.75 acres of resource property at Weymouth North in the amount of $1,900.00. There was confusion as to whether all lands of the late Maurice Sabine had been previously conveyed.

HELD: The appeal is dismissed. There is no award as to costs.

The issues in this appeal are: 1. who is(are) the assessed owner(s) of the subject land for the 1984 assessment; and 2. the number of acres to be assessed to the owner(s). As of Dec.1. 1983 the latest owners determined from a search of the Registry of Deeds and Registry of Probate were the Trustees of the Estate of Maurice Sabine. A portion of the property was conveyed by a Deed recorded on Sept.5, 1984 and while the Deed is dated August 12, 1983 it is not clear when it was delivered. The Board cannot be sure whether title to that portion was acquired in 1983.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by the estate of MAURICE SABINE, from the decision of the Regional Assessment Appeal Court, Annapolis - Digby Assessment Region;

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: CHESTER SABEAN, Executor and Trustee of the Estate of Maurice Sabine, without counsel;

MARIAN TYSON, LL.B., for the Director of Assessment.

DECISION

This is an appeal by the Estate of Maurice Sabine from a decision of the Regional Assessment Appeal Court, Annapolis - Digby Assessment Region, made June 25, 1984, by which the 1984 assessment in the amount of $1,900.00 of the Appellant's resource property consisting of 11.75 acres of land at Weymouth North, Digby County, was confirmed.

The Appellant's Notice of Appeal is dated July 10, 1984, and it was received by the Board on July 13, 1984. There was no objection to the Board's jurisdiction to hear the appeal and the Board proceeded to hear the merits of the appeal.

Chester Sabean is an Executor and Trustee of the Estate of Maurice Sabine. In his capacity as Executor and

Trustee he appealed the Estate's 1984 assessment on the following grounds:

> 1. The Estate had disposed of all its real property in 1983.
>
> 2. The number of acres of land owned by the Estate at the time of its disposition in 1983 was approximately 5 acres and not 11.75 acres.

The only witness called to give evidence was Murray Harris, Director of Assessment for the Annapolis - Digby Assessment Region.

The amount of land assessed in the name of the "Estate of Maurice Sabine, deceased" for the 1984 assessment year was 11.75 acres. In preparing for the hearing of this appeal, Mr. Harris attended at the Registry of Deeds and Registry of Probate for Digby County and searched the Registry records for documents relating to the transfer of land to and from Maurice Sabine in Weymouth North, Digby County. Mr. Harris introduced a folder of documents prepared by him, filed as Exhibit S-7. The folder contains photocopies of the Deeds to the land acquired by Maurice Sabine in Weymouth North, photocopies of Deeds to lands disposed of by Maurice Sabine in Weymouth North and a photocopy of the last Will and Testament of Maurice Sabine. Mr. Harris said that Maurice Sabine acquired a total of 21.5 acres of land in Weymouth North, Digby County in 1938 and 1939. He disposed of portions of this land in 1972 to Ella Newcombe, in 1976 to Roger and Mary Harvieux and in 1978 to Mark and Donna Thibault leaving himself with 11.75 acres of his original 21.5 acres of land.

Mr. Sabine died in 1979. The "Estate of Maurice Sabine, deceased" was assessed for 11.75 acres of land from 1980 to 1984. Under his Last Will and Testament, Maurice Sabine devised all his real property to Chester Sabean and Parker Manzer in trust. The Will was recorded at the Registry of Deeds on October 29, 1981.

The effective date for determining the assessment of the subject property for the 1984 assessment year was December 1, 1983. Mr. Harris stated that he did not find any documents evidencing a disposition of real property by the Estate of Maurice Sabine recorded at the Registry of Deeds or Registry of Probate from 1979 to December 1, 1983. In his opinion, 11.75 acres is the correct number of acres to be assessed to the "Estate of Maurice Sabine, deceased" for the 1984 assessment year.

A Deed dated August 12, 1983, from the Executors and Trustees of the Estate of Maurice Sabine to Shirley D'Entremont for a portion of the 11.75 acres was recorded at the Registry of Deeds on September 5, 1984. Mr. Harris stated that his office was not aware of the Deed to Shirley D'Entremont at the time the 1984 assessment roll was completed.

Mr. Harris spoke by telephone with Chester Sabean who advised him that the Trustees of the Estate also conveyed land to Sherwood Sabine and Mitchell Langdale in 1983. Mr. Sabean did not have a copy of the executed Deeds to Mr. Sabine or Mr. Langdale. Mr. Sabean also advised Mr. Harris that he did not include the land conveyed to Mitchell Langdale in his estimate of the number of acres remaining in the Estate at the time the Estate was wound up in August, 1983, because he thought the Langdale matter had already been completed. This accounts for the difference between the Assessor's estimate of 11.75 acres of land owned by the "Estate of Maurice Sabine, deceased" and Mr. Sabean's estimate of 5 acres.

Mr. Harris spoke with James Outhouse, Proctor for the Estate, who provided him with copies of unexecuted deeds from the Trustees of the Estate to Sherwood Sabine and Mitchell Langdale. Mr. Outhouse could not say whether the deeds were executed by the Trustees.

Mr. Harris spoke with Sherwood Sabine who said that he did not receive a deed from the Trustees of the Estate.

Mr. Harris spoke with Mitchell Langdale who said that he thought he received a deed from the Trustees of the Estate and that he subsequently conveyed the land to someone else.

The Estate of Maurice Sabine was wound up in August, 1983. Mr. Harris could not find an executed deed from the Trustees of the Estate of Maurice Sabine to either Sherwood Sabine or Mitchell Langdale.

The issues in this appeal are:

1. Who is (are) the assessed owner (s) of the subject land for purposes of the 1984 assessment.

2. The number of acres to be assessed to the owner or owners.

Section 32 and Section 33(1) of the Assessment Act read as follows:

> 32. (1) Real property may be assessed to the person appearing from a search of the records at the Registry of Deeds and at the Registry of Probate to be the latest owner thereof and neither an assessor nor a court of appeal may be required to transfer the ownership of real property on the assessment roll from that person to another, unless and until the deed or other document that is evidence of an alleged ownership has been recorded at the Registry of Deeds or at the Registry of Probate.
>
> (2) When the assessor believes that the owner formerly assessed is deceased, he may assess property in the name of the "Estate of... (giving name of deceased former owner), deceased".
>
> 33. (1) Property under the control of a person as executor, administrator, trustee, guardian or agent may be assessed in his name in his representative capacity and the assessment and any subsequent proceedings shall be kept separate and distinct from those based on assessment of the property held by that person in his own right."
>
> Section 89(1)(d) of the Act reads as follows:
>
> 89(1) "On any appeal, the court may:
>
> > (d)transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therefor."

On December 1, 1983, the effective date for determining the assessment of the subject property for the 1984 assessment year, the latest owners of the subject property determined from a search of the records of the Registry of Deeds and Registry of Probate by Mr. Harris were Chester Sabean and Parker Manzer as Trustees of the Estate of Maurice Sabine. There were no other documents evidencing a change in ownership of the subject land from the Trustees recorded at the Registry of Deeds or the Registry of Probate from the time the Trustees acquired title to the property under the Will of Maurice Sabine until a deed from the Trustees to Shirley D'Entremont for a portion of the subject property was recorded at the Registry of Deeds on September 5, 1984.

The Board is of the opinion that Shirley D'Entremont, Sherwood Sabine and Mitchell Langdale should not be assessed for part of the subject property for the 1984 assessment year. There were no documents presented at the hearing evidencing that Sherwood Sabine and Mitchell Langdale acquired title to part of the subject property from the Trustees of the Estate of Maurice Sabine. The evidence is not clear whether the Deed dated August 12, 1983, was delivered to Shirley D'Entremont in 1983 and therefore the Board cannot be sure whether she acquired tital to the property in 1983. The Deed by which Shirley D'Entremont acquired tital to a portion of the subject property was not recorded at the Registry of Deeds until September, 1984.

While it may not be incorrect to assess the property in the name of the Estate, in the opinion of the Board, since the subject property has vested in the Trustees of the Estate, the property should be assessed in the name of Chester Sabean and Parker Manzer as Trustees of the Estate of Maurice Sabine for the 1984 assessment year.

The Board is also satisfied that the number of acres of land assessable to the Trustees of the Estate of Maurice Sabine for the 1984 assessment year is 11.75 acres.

There will be no award as to costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of April, A.D., 1985.

Darryl Wilson

DARRYL W. WILSON.

Ryan v. City of Halifax

ASSESSMENT--RESIDENTIAL--MARKET VALUE--ALLOWANCE FOR INCOMPLETE STRUCTURE--ASSESSMENT ACT, S.84(2)

This is an appeal from a decision of the Halifax City Regional Assessment Appeal Court reducing the Appellant's 1984 residential assessment from $227,700.00 to $210,000.00. The original 1984 assessment was for $277,000.00 and after an appeal was filed, the assessment was reviewed and reduced because of an error relating to the measurement of the property and because information relating to the structure was incomplete. The Regional Appeal Court reduced the assessment as a result of evidence of the property being more incomplete as of Dec.1,1983 than had been allowed for in the reviewed assessment. The assessor now estimates the market value at $188,800.00. The Appellants agree with the new estimate.

HELD: The appeal is allowed and the market value determined to be $188,800.00. No costs were sought and none are awarded.

The Board accepts the evidence of the assessor, who is experienced, familiar with the subject property and has used an acceptable valuation method.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by William and Sandra Ryan, from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region;

BEFORE: D.W. Wilson, C.A., LL.B, Member

COUNSEL: JOHN McFARLANE, LL.B., for the Appellants;

MARIAN F.H. TYSON, LL.B., for the Director of Assessment.

DECISION

This is an appeal by William and Sandra Ryan from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region, made November 28, 1984, whereby that Court reduced the assessment of the Appellants' residential property consisting of land and dwelling with attached garage located at Civic Number 25 Litchfield Crescent, Halifax for the 1984 assessment year from $227,700.00 to $210,000.00.

The Appellants' Notice of Appeal is dated January 17, 1985 and it was received by the Board on January 18, 1985. There was no objection to the Board's jurisdiction and the Board assumed jurisdiction to hear the merits of the appeal.

The Appellants listed seven grounds of appeal in their Notice of Appeal. The only grounds of appeal raised at the hearing were:

(1) That the decision of the Regional Assessment Appeal Court results in an assessment greater than the actual market value of the Appellants' land at the time of assessment.

> (2) That the Regional Assessment Appeal Court erred in not sufficiently reducing the deduction to be given for the incomplete structure."

The only person to give evidence during the hearing was Rod Caiger. Mr. Caiger is employed by the Province of Nova Scotia as a Senior Assessor in the Halifax City Assessment Region. He has been an Assessor since 1981 and a Senior Assessor since November of 1984.

The original value of the Appellants' property for the 1984 assessment was set at $277,000.00 by an assessor in the Halifax City assessment office other than Mr. Caiger. When the Appellants appealed that assessment, Mr. Caiger carried out a review of the assessment pursuant to Section 84(2) of the Assessment Act. He inspected the subject property in March 1984 as part of his review of the assessment. He found an error on the assessment card relating to the measurement of the subject property.

Mr. Caiger spoke by telephone in March 1984 with Mr. Ryan who advised him that the house was incomplete on December 1, 1983, the effective date for valuing the property for the 1984 assessment year. Mr. Ryan gave details of the incomplete features of the house as of December 1, 1983. Mr. Caiger said that the assessment card for the subject property indicated the property was inspected on November 29, 1983 and there was no indication on the card that the house was incomplete. Mr. Caiger said he found it difficult to believe Mr. Ryan could be so certain about which items in the house were incomplete on December 1, 1983. Therefore he valued the building as if it was completed and then gave a 5% allowance for incomplete items. The 5% allowance was only an estimate on his part and was not based on any objective evidence or observations. Pursuant to Section 84(3) of the Assessment Act, Mr. Caiger, on behalf of the Director of Assessment, altered the Appellants' 1984 assessment from $277,000.00 to $227,700.00.

The Appellants were dissatisfied with the altered assessment and filed a Notice of Dissatisfaction with the Recorder of the Regional Assessment Appeal Court, Halifax City Assessment Region.

At the Regional Assessment Appeal Court hearing, Mr. Ryan introduced photographs showing the subject property at various stages of completion. The Regional Assessment Appeal Court accepted Mr. Ryan's evidence regarding the incomplete items and increased the allowance for incomplete items from 5% to 15%. The effect of this was to reduce the assessment of the Appellants' property from $227,700.00 to $210,000.00.

The Appellants' were dissatisfied with the decision of the Regional Assessment Appeal Court and appealed that decision to this Board.

For the hearing of the appeal before the Board, Mr. Caiger estimated the market value of the subject property to be $188,800.00. He said that he now accepts Mr. Ryan's comments about the parts of the dwelling that were not complete as of December 1, 1983. He also said that at the Regional Assessment Appeal Court Hearing, he was not asked to calculate the effect the incomplete items would have on the market value of the subject property. He reduced his estimate of market value of the subject property from $227,700.00 to $188,800.00 to reflect the decrease in market value due to the incomplete items mentioned by Mr. Ryan.

Mr. Caiger estimated the market value of the subject property by the cost method. He estimated the land value to be $64,200.00 and the dwelling value to be $124,573.00 for a total value of $188,773.00 which he rounded to $188,800.00. His estimate of $64,200.00 for the value of land was based on an analysis of vacant land sales in the Pine Bluff subdivision where the subject property is located. In estimating the dwelling value, Mr. Caiger used the Nova Scotia Residential Assessment Manual to calculate the reproduction cost. In calculating the reproduction cost, he placed the building in a 1C classification. He initially calculated the reproduction cost for a completed two-storey Class 1C dwelling using costs indicated in the Residential Assessment Manual. He adjusted the reproduction cost of the subject dwelling for the incomplete items and for any items found in the subject dwelling which differed from items included in the Residential Assessment Manual for a Class 1C dwelling. Since the building was still under construction at the effective date for valuing the subject property for the 1984 assessment year, Mr. Caiger did not make any allowance for physical depreciation or functional obsolescence. In his opinion, the subject property did not suffer from any locational obsolescence.

The Appellants agree with Mr. Caiger's estimate of

$188,800.00 as the market value of their property for the 1984 assessment year.

The Board accepts the evidence of Mr. Caiger and is satisfied that he valued the subject property in accordance with Section 38 of the Assessment Act. He is an experienced assessor familiar with the subject property and he has valued the subject property by an acceptable valuation method supported by market data on land value and building costs.

The Board determines the market value of the subject property for the 1984 assessment year to be $188,800.00.

Both parties stated that they were not seeking costs. The Board makes no award as to costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of April, A.D., 1985.

D.W. WILSON

Clarke v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--COST APPROACH--MARKET APPROACH--VARIOUS DISCREPANCIES--REMEDIES--ASSESSMENT ACT, SS.15, 38, 39, 84, 89, 101

This is an appeal from a decision of the Halifax City Regional Assessment Appeal Court confirming the 1984 residential assessment of the Appellants' property on Jubilee Road. One of the Appellants gave evidence of their behalf. He stated that if his property were for sale, he would be willing to sell it for $135,000.00, that being its fair price. His original 1984 assessment was for $142,500.00. After the Appellants filed an appeal the Director reviewed his assessment and revised it upwards to $144,000.00.

HELD: The Board allows the appeal and determines the Appellants' 1984 assessment to be $137,800.00.

The prime remedy sought by the Appellants was for the Board to send the assessment back for re-hearing by the Regional Assessment Appeal Court. This does not fall within the powers of the Board. The Board is constitutionally unable to conduct a judicial review of the action of the Regional Assessment Appeal Court. There was disagreement over the size of the Appellants' lot of land. The assessor was unable to find the Appellants' Deed, but the burden is on the Appellants to reduce the size of the property assessed to that in the Deed, and they should have produced, but did not, the Deed. The assessor visited the property and assessed the land that appeared to be in occupation. The Board accepts this evidence of the assessor. The Appellants may have been able to prove they owned less, but they chose not to do so. The Board does feel that some allowance should be made for the active railway line, in a deep cutting, behind the Appellants' home, beyond that considered by the assessor. The Appellants' concern for traffic on Jubilee Road has been already taken into account. As to the Appellants' concern over flooding in their basement and garage, the assessor had the opportunity to take this into account but did not check it out. The Board believes, as to flooding, the straightforward recital of the Appellants. This results in a depreciation of the building's value that was not taken into account. The Board accepts the balance of the assessor's evidence, which values the property at $154,900.00, less the deductions for the railway and flooding. The Board believes that a deduction of 11% for these items would be appropriate.

1985 M.B. No. 110-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by CHARLES W. & DORIS L. CLARKE, from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region.

BEFORE: R.L. WELDON, Member.

COUNSEL: CHARLES W. CLARKE, Without counsel, on his own behalf,

RANDALL DUPLAK, LL.B, on behalf of the Director of Assessment.

DECISION

This is an appeal from a decision of the Regional Assessment Appeal Court, Halifax Region, dated at Halifax, Nova Scotia, the 15th day of February, 1985 concerning the residential assessment of 6694 Jubilee Road, Halifax, for the assessment year 1984.

That Decision, as appears from its back, was received by the Recorder on February 27, 1985, and mailed by the Recorder February 28, 1985.

Notice of the Appeal to this Board was then sent out dated at Halfiax, N.S. on 20th. March, A.D., 1985, and was received by the Board March 20, 1985. According to the parol evidence of the Appellant, Charles Clarke, he personally served this notice on the persons listed thereon within two days of its date.

Pursuant to this Notice of Appeal, the Clerk of the Board prepared a Notice of Hearing dated April 19, 1985, which was sent out by mail addressed to:

1. Charles W. Clarke, one of the Appellants acting on behalf of himself and the other Appellant.

2. Gladys I. Blennerhassett, City Clerk, Halifax.

3. Honourable Thomas J. McInnis, Minister of Municipal Affairs.

4. Walter Thompson, Vice-Chairman, Halifax County Regional Assessment Appeal Court.

A copy was also sent out to Ms. Marian F.H. Tyson, a solicitor for the Attorney General, seconded to the Department of Municipal Affairs.

A Change of Solicitor dated April 30, 1985, was filed with the Board May 1, 1985, nominating Randall Duplak, a departmental solicitor and that Notice was sent, inter alia, to the Appellant Charles Clarke.

At the place and time appointed for the hearing Mr. Duplak appeared for the Director and Mr. Charles Clarke appeared for the both appellants. Mr. Clarke gave evidence of service of the Notice of Appeal. Evidence of service of the Notice of Hearing was also presented from the records of the Board and the Board, with the consent of all present, assumed jurisdiction to hear this appeal. Mr. Duplak moved to attach a first page to a report which eventually was proved as Exhibit C-6. Mr. Clarke consented to the insertion. Mr. Clarke then asked for an adjournment to consider C-6 which he said he had only read that morning. After discussion, the Board set Monday, June 3rd, 1985, at 10:00 a.m. being the time, and the Board Room of the Expropriations Compensation Board as the place, for the hearing of the adjourned appeal.

At the adjourned hearing Mr. Charles Clarke gave the only evidence for the Appellants. He stated his original undesired assessment for 6694 Jubilee Road was around $142,500.00. Within the time limited he filed a Notice of Appeal in the manner prescribed. Under Section 84 of the Assessment Act, within two weeks of the filing of the Notice, his assessment was revised upwards by the Director to $144,000.00. Mr. Clarke was incensed saying this was the first time that the Director had done this to him. Having been dissatisfied with the amount of $142,500.00, he was equally or more upset with $144,000.00 assessment and he again filed a Notice of Appeal. The Appeal was heard by the Regional Assessment Appeal Court on the date set, September 24, 1984. Before this Board, he swore he had given evidence to the Regional Assessment Appeal Court and that there had been an assessor present at that Court ready to give evidence but who had not made the original assessment. Mr. Clarke had objected to hearing that assessor give secondhand information and asked that the assessor who had made the original assessment should present the Director's evidence.

On the grounds that that assessor was ill, an adjournment was granted. Mr. Clarke said that he took ill the night before the adjourned hearing and was so ill that he could neither appear nor make arrangements to have someone represent him. Mr. Clarke said that, in the presence of the parties there, he put the following points to the Regional Assessment Appeal Court (which he felt detracted from the value of his property and which ought to be entitled to consideration in arriving at the value of his property):

1. He said his property backed on the railway cutting of the CNR Railway and he clearly felt this affected sale value.
2. That he felt that the assessor had given no consideration to the fact that his lot was a corner lot and therefore the cost of installing City services was doubled.
3. That he felt the swollen traffic on Jubilee Road, being caused by an increase in County traffic, by the disruption in traffic caused by the construction of Quinpool Centre and by the future traffic considerations of row housing being built at the foot of Jubilee Road on the old Jubilee Boat Club site, also affected the value of his property.
4. He felt that the slope of his land caused his garage and cellar to flood every time there was a heavy rain storm. He said he was unable

to correct this defect. He also said there was a very severe leak in the southeast corner of his basement causing the paint to peel off in the basement.

He said that he stated these complaints under oath to the Regional Assessment Appeal Court and he repeated them before this Board.

He went on to say that, if his property were for sale, he would be happy to sell it for $135,000.00 which he thought was a fair price.

When pressed by the Board, he spoke concerning his real estate experience and stated that he was admitted to the bar in 1933, that he had worked for the Daley, Phinney firm until the beginning of World War II. While there, he did their real estate and collection work. After the war he opened his own office where he subsequently was joined by Danny Morrison. His practice alone and with Mr. Morrison was in the field of probate, real estate and an occasional divorce. He said that in the early 1950's he organized thirteen dfferent real estate companies engaged in the second mortgage business. He said he had worked with them consistently until about five years ago when he decided to take it a little easier. He then disposed of nine of the companies and is now looking after four real estate companies dealing in real estate and second mortgages. He said he had given evidence before the Royal Commission on Interest Rates which Royal Commission had adopted his position on interest rates. He is still active in the real estate field, but not as active as he was, and he is financially well fixed from his activities in the field and he can go and come when he likes. He says there are one and one-half girls looking after his interests and this allows him a great deal of freedom in later years. He said his companies are members of the Real Estate Board and also members of the Real Estate Congress and his main company now appears to be Family Realty Limited. He stated, of course, that if his house was larger in size that its value ought to be increased under Section 84. He said he had bought his house in 1954 and the deed was recorded in Book 1257, page 239 and he had been an owner of the house since that time. He knew about the railway cutting at the time he purchased. The house was not built by him. He felt that his house fronted on Jubilee Road and that the side was on Fairfield Street. He felt that his abuttment on Fairfield Street was 75 foot and that he only had 62 feet of frontage on Jubilee Road; that's all he claimed. He refused to accept that there was, in fact, 94 feet under occupation on Jubilee road. He said that, in addition, he had a right-of-way on Fairfield Street. He denied categorically that his frontage could be any more on Jubilee Road than approximately 63 feet. He felt the traffic on Jubilee Road was extremely heavy and going to get heavier when the "row housing" was occupied. As to the flooding, he stated he never was there when the assessor was present but he presumed his wife was there. She knew about the flooding. To the best of his knowledge, she had made no mention to the assessor of the leaks that he, Clarke, complained of but he felt the leaks should have easily been ascertainable by the assessor on inspection. He suggested the railway cutting reduction be 5% based on his experience. He felt properties two or three houses away, which were not on the railway cutting, would bring a higher price than his. Any prudent purchaser of his property would expect a reduction in its price on account of the cutting. He was unable to make an estimate of the extra costs of City services for his corner lot. He felt that the allowance for the slope and the flooding should be between 10 and 15% and, when pressed on cross-examination, he averaged it at 12½%. He agreed that if you applied all his proposed deductions and all his mathematics that you would come to an $108,000.00 valuation which, he thought, was too low. He stated his insurance was $85,000.00. He did not produce his deed.

Mr. Ronald Borne gave evidence for the Respondent. He said he lived at Prospect Bay and he was an employee of the Department of Municipal Affairs, Halifax City Assessment Region and had been so employed since February, 1981. He said he had three years assessment training at Dalhousie University and received a certificate in 1984. He has completed a four-year course in business administration at Dalhousie University which he completed in April, 1985.

He has been taking annual assessment courses since his current employment started in 1981. He has become a senior assessor. He has done all types of assessments, but he works mainly in residential and does a mixture of commercial and residential. He has given evidence to Regional Assessment Appeal Courts and the evidence has been accepted.

Mr. Duplak then tendered his qualifications and Mr. Clarke cross-examined him. After examination and cross-examination he was accepted by the Board as a qualified assessor entitled to give opinion evidence on the matters of assessment for residential properties located in the City of Halifax.

He tendered Exhibit C-6 which is his valuation report on 6694 Jubilee Road, Halifax, Nova Scotia, the subject property calling for an estimated market value for assessment purposes of $154,900.00 as of January 1, 1983, which would fix the assessment for 1984. He said this was the usual type of assessment done and the effective date was January 1, 1983. He said he had been unable to have the deed found with a title search. He then went to study the plans and then he made a study of the occupation and a "view" of the site. He said he measured the internal corner of the intersection of the two sidewalks at the corner of Fairfield and Jubilee and viewed the line of occupation. He said he then measured back to the fence and then along to the place of beginning and came up with a set of dimensions which are shown in his report. He dealt with the comparables, as shown in his report, and made appropriate adjustments. He reviewed the basement rooms and gave them no value. On cross-examination he said he used Nova Scotia provincial assessment manuals, depth factor tables and other tables to bring the costs up-to-date. He dealt with the problems one by one raised by Mr. Clarke in the Regional Assessment Appeal Court and raised again in his own testimony. He felt there was no disadvantage or reduction in value to Mr. Clarke because the property abutted on a rail cutting and he compared the area to Dunvegan Drive where some of the lots abut the rail cutting. He couldn't recall the figures on front footage on Dunvegan Drive but in any event he had made no special allowance. He said he had made no special allowance as to the corner lot because the cost of City services and said there was no value for or against on that. He said he had considered traffic flow but said the front footage values that he had used took into account the traffic flow. As to the water damage he said it hadn't been brought to his attention and he observed nothing in the basement related to humidity except the peeling of paint. He felt in his opinion that it was a three-car "driveway" and not a two-car "driveway" as suggested by Mr. Clarke, and he felt that what he had seen in the basement could be the result from normal humidity arising from a bathroom.

There was no rebuttal evidence called. At the conclusion of the evidence Mr. Charles Clarke made some remarks and Mr. Duplak made arguments on behalf of the Director.

Mr. Clarke's positive evidence involving value may be summed up in one sentence: "*If* his property were for sale, he would be willing to sell it for $135,000.00, that being its fair price." That is his only positive statement as to value, and, contrary to the representations of Mr. Duplak, is "some" evidence of value at least in the sense that, if it stood alone before the Board, the Board could make a decision based on that evidence. Mr. Clarke's next position was, in effect, an attack upon the report prepared and filed by Mr. Borne. He stated that the valuations were incorrect on the following grounds:

1. That they assessed him for too much land;
2. That there was no reduction allowed him for the railway cutting abutting the property;
3. That there was no reduction for the double cost of installing civic services on a corner lot;
4. That there was no reduction for the heavy traffic generated on Jubilee Road;
5. That there was no reduction granted for the slope-caused flooding of his basement and garage in heavy storms and the severe leak in the southeast corner of his basement;
6. That he had been treated improperly

in the Regional Assessment Appeal Court;

7. That he had been improperly used by the Director who had raised his assessment under Section 84, thus forcing Mr. Clarke to forward a second Notice of Appeal.

At the hearing before this Board, Mr. Clarke testified that he had led in evidence the essence of numbers 2, 3, 4, and 5 supra before the Regional Assessment Appeal Court, that there was an assessor there other than the actual assessor of the property, ready to give evidence on behalf of the Director and, because of Mr. Clarke's objections, the matter was adjourned on the grounds that the "real" assessor of the property was ill. At the time and place set for the adjournment Mr. Clarke was too ill to either attend or to have others make other arrangements. Mr. Duplak's representations to this Board indicate, in essence, that the Director regards the factual statements in Mr. Clarke's Notice of Appeal as essentially correct. The Board finds, on this evidence that there was a hearing of this matter before the appropriate Regional Assessment Appeal Court and that that hearing came to a conclusion.

Thus, in this particular case, there has been a hearing which came to a conclusion and the hearing confirmed the assessment and this Board can hear the appeal. This Board clearly must limit itself, in these circumstances, from commenting further on the proceedings before the Regional Assessment Appeal Court except to point out to the Appellant that the prime remedy sought here by him, namely to send the assessment back for re-hearing to the Regional Assessment Appeal Court, does not fall within the powers of this Board.

Mr. Duplak concurred in the course of his oral argument that the Director agreed that the Notice of Appeal, whatever its contents and at least in this case, should allow the Board to hear evidence de novo on the issue of valuation. This approach seems to allow the Board to discharge its function. The Board, then, is considering this appeal on the grounds that the Appellants believe their valuation to be too high.

The Board holds the opinion that it is constitutionally unable to conduct a judicial review of the action of the Regional Assessment Appeal Court. In the instant appeal, the Regional Assessment Appeal Court did take jurisdiction and did have a hearing. The Board, in this case, finds that while it has no jurisdiction to review the action of the Regional Assessment Appeal Court with a view to correcting the process therein, it has a jurisdiction to determine, as a matter of fact, whether or not that Court had a hearing and arrived at a decision on valuation.

The Board will deal first with the major issue, namely "the extent of the land assessed" being the first of Mr. Clarke's objections in the order that they are listed by the Board. Mr. Clarke, as an Appellant, did not produce his deed. At the first day of this hearing, Mr. Duplak had stated that the Director had been unable to find that

Deed by title search. At the latest, at the time of the first day of this hearing, Mr. Clarke would have been aware that the "extent of the land assessed" was a major factor, (at least in the mind of the assessor) in arriving at the land value. The assessor arrived at land size (as he was required to do under Section 15 of the Assessment Act) by the following techniques:

A. He read the existing assessment card. This card contained dimensions believed correct by Mr. Clarke and indeed dimensions by which his property had been assessed for all the time he had occupied the property. These dimensions apparently agreed with the oldest plan in existence (circa 1944) presented in evidence to this Board both by Mr. Clarke and presented by the Assessor included in Schedule "D" to his valuation report which showed square footage of 6,590 with 67.8 front footage on Jubilee Road, 75 foot frontage on Fairfield, 110 foot on the common boundary between lots 1 and 2 and 84.92 feet on the CNR boundary enclosing a four-sided figure and marked Lot No. 1.

B. He made or caused to be made (which is not clear from the evidence) a search of the records at the Registry of Deeds at Halifax and says that whatever search was made did not disclose a deed to the subject property.

At the adjourned hearing Mr. Clarke gave a book and page for the deed, the date and the parties, but did not produce the deed. Thus it is proven the deed exists and was registered.

On the evidence it is free for the Board to conclude the title search performed by the assessor to find the deed in question was not a diligent inquiry into the "extent" of the property as required by Section 15 of the Assessment Act. A proper search would, on the evidence, have disclosed the Deed in question and, if Mr. Clarke had been a respondent in this Appeal, the failure of the assessor to make a proper title search might have had very severe results. The burden being on Mr. Clarke to proceed with his appeal, the main thrust of his case required him to reduce the frontage of the property in his occupation to the property which, he said, his deed contained. He chose not to produce the deed which could easily have been given by him and which would then have been before the Board and would have been the best evidence of its contents. The Board must say that Mr. Clarke's omission to present his Deed to it at least balances the failure of the assessor to do a proper title search.

C. He looked to Schedule "D" (Supra), and saw the note of February 22, 1950, that noted that Fairfield Road was 26.9 feet west of its location on the Plan and thus increased the Jubilee Road boundary to 94.7 feet, Fairfield frontage to 75 feet common boundary of Lots 1 and 2 of 137.3 feet and the railway boundary of 84.92 feet.

D. He then also went to a plan included as Schedule "E" of the valuation report (Circa 1955) which showed a dimension of 98 feet on Jubilee road, 75 feet on Fairfield, the common boundary of Lots 1 and 2,137.3 feet, and 82 feet on the railway boundary.

One should note that Schedule "E" is not, per se, a re-survey of Lot 1, but a re-subdivision of Lots 2 and 3 and contains a note as follows:

> "Note: Front footage on Fairfield Road Lot were evidently taken from a point 16.7 feet south of the south curb line of Jubilee Road which is the distance from iron pipe on western boundary of railway right-of-way to face of south curb Jubilee Road. the actual city of Halifax southern official line of Jubilee Road is 15.5 feet south of the curb line was not used - checked April 9, 1955."

If this note is correct then Lot 1 does not abut Jubilee Road at all. Its north boundary is 1.2 feet south of the south line of Jubilee Road and thus a piece of property 1.2 foot in width is owned by some person other than the owner of Lot 1 and abuts lot number 1 on its northern boundary towards Jubilee Road. If lot number 1 does abut Jubilee Road and the note is correct then the frontage on Fairfield Road would be 76.2 feet and the road boundary lines would be extended slightly now and the railway boundary lines would be extended slightly more than 1.2 feet since the railway boundary line is not at right angles to the Jubilee Road south boundary. All viva voce evidence indicates that the property butts on Jubilee and Fairfield so this 1.2 feet must be included in the property.

> E. He attended on the site with another person from the Department and made measurements from his observations of occupation. His on-site expedition produced measurements of frontage on Fairfield of 75 feet and 96.6 feet on Jubilee Road but was "unable to measure the back or the other side".

Whatever detriment, if any, the failure by the assessor to find the registered deed caused to the Director's position, this on-site visitation gave the assessor and eventually this Board accurate evidence by which to calculate the extent of the property to be assessed. Mr. Clarke's failure to produce his deed prevented him succeeding in being assessed only for the area prescribed by the deed. As to the "extent" of the property, the Board accepts the position of Mr. Borne that he will assess what appears to be in occupation. When, and if, on this point of occupation, the evidence of Mr. Clarke and the evidence of Mr. Borne conflict, the Board, in the circumstances outlined above prefers the evidence of Mr. Borne. The Board thus finds the land size under occupation by Mr. and Mrs. Clarke being that mentioned in the valuation report as being the basis for the calculation of example B-1. Mr. Clarke may have been able to prove that he owned less land than he occupied but he chose not to do so either with the assessor or to the Board. Mr. Borne was left to the apparent occupation and he properly viewed the site and assessed on the basis summarized above.

Mr. Clarke testified that he received a substantial reduction in price because of the location of the railway cutting abutting the property when he purchased. Mr. Borne felt that, at the time of the assessment, the railway cutting was a known factor and was fully accommodated in the valuations he has used. He cited properties on Dunvegan Drive sold in the 1960's as being support for this position. When asked by his own counsel what were the front foot values on Dunvegan Drive, he could not recall what values were used. On the evidence before this Board on this hearing, it is clear that the Dunvegan Drive examples cited by the assessor as the support for his contention are of no probative value since they are not sufficiently significant, even to the deponent, to be capable of his recall or indeed to be capable of either cross-examination or re-calculation, if indeed, they were added into the calculations in the first place. We are thus left with the bald statement of the assessor that the railway cut had no effect in valuation countered by Mr. Clarke's statement flowing from his rather ancient purchase price and a generalized perception of the Board (known to any juror of the vicinage) that in a residential area an active railway line in a deep cutting will adversely affect the value of the abutting real property. This being the state of the evidence before this Board, the Board feels that some allowance should be given to the subject property because it abuts the railway cutting and no such allowance was made by the assessor.

As to the double costs of the City services for a corner lot, Mr. Clarke, in essence, withdrew this "ground for appeal" and the Director says that it is of no concern to him and therefore the Board allows no reduction or increase in valuation under this heading.

Traffic has surely increased in the area of the subject property since Mr. Clarke's purchase of the same in the 1950's. Mr. Clarke refers to the building of the Quinpool Centre, especially to what he calls the County area traffic, and to the future growth of traffic from which he refers to as the "row houses" on the site of the old Jubilee Boat Club. While accepting the statements in this paragraph as factual, it seems to the Board the calculations made by Mr. Borne tend to include the effect of the traffic problem on the general valuation of the area at least to the extent of the existing traffic. Thus the traffic problem is applied fully across the properties and has already been taken care of in the calculations before the Board. Mr. Clarke was unable to quantify the effects of future traffic from the "row houses" (which the assessor really did not contemplate) so no allowance can be made for this. Thus there is no allowance made by this Board for either the existing traffic or the future traffic, either by way of reduction, or by way of increase of assessment.

The Board now considers the alleged slope causing the flooding of the garage and the alleged severe leak in the southeast corner of the building. Mr. Clarke gave direct evidence concerning flooding of basement and garage in every major storm and also direct evidence of the severe leak. Mr. Borne noticed peeling of paint in the downstairs bathroom and said he was not directed to any flooding and saw no indication of any flooding. Mr. Clarke said he did not see any assessor but that he had elicited the flooding evidence in the Regional Assessment Appeal Court. Thus he put the Director on warning on this ground at the latest in February. Since then, the assessor might have made major efforts to determine the validity or non-validity of the flooding claims and minutely inspected and perhaps tested the premises for scientific indications of flooding. The assessors did nothing more than send in an assessor who said he was not on notice as to flooding as a claim for reduction. In these circumstances there appears to be some lack of communication certainly between the taxpayer and the assessor but even within the assessment department itself. In these circumstances elicited from the evidence before it, the Board believes, as to flooding, the straightforward recital of Mr. Clarke. Having regard to the agreed on damage to the paint, the Board in this matter prefers the testimony of Mr. Clarke and find that the periodic flooding of basement and garage in heavy storms did and does exist and was not fully taken into account by the assessor in arriving at his valuation of the subject property. The Assessor did not add value because of the basement improvements but, as well, he did not reduce the valuation and the Board believes that the flooding and the leak in the southeast corner of the basement exist and ought to result in a depreciation of the building's value.

The Board does not have jurisdiction to review the alleged failure of the Regional Assessment Appeal Court on the matters set out by Mr. Clarke. If Mr. Clarke feels aggrieved, his remedies, if any, are to be found elsewhere than the Nova Scotia Municipal Board.

The Board must then determine matters pursuant to Section 101 of the Assessment Act set out in Section 38(3) and exercise its powers under Section 89. Section 38 of the Assessment Act as it presently exists is set out as follows:

> "38(1) All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or

municipality.

> (2) The Director may from time to time prescribe a past date as a base for the determination of the market value of a property for the purposes of subsection (1).
>
> (3) Notwithstanding subsections (1) and (2), the assessment of a property shall reflect its state as of the date referred to in subsection (1A) of Section 64."

For the year 1983 and up until June 11, 1984, Section 38 of the Assessment Act read as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Page 3 of the Assessor's Valuation however correctly sets out the definition of market value and the sections under the then existing statute which must be followed by this Board since it is determining value as of January 1, 1983. The Board accepts both the purpose of the appraisal and definition of value set out on page 3 of Exhibit C-6.

> "PURPOSE OF APPRAISAL
>
> To estimate the assessment value of the subject property for the assessment year 1984. Assessed value for 1984 is based on Market Value as of January 1, 1983, in accordance with Sections 38 and 39 of the Assessment Act, Revised Statutes of Nova Scotia 1967, Chapter 14 as amended from time to time.
>
> DEFINITION OF VALUE

> Market Value is defined as 'such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality.'
>
> Effective Date of Valuation: January 1, 1983
>
> Identification of Property: 6694 Jubilee Road,
> HALIFAX, N.S."

The Board accepts the finding of the assessor to proceed with the valuation ignoring the income approach in this case since no income was involved.

Subject to the anomalies listed above which the Board feels affect the subject property, the Board notes the techniques used by the Assessor and the Board approves of the cost approach and the market data approach as appropriate in this case and notes they arrived at approximately the same amount. These appropriate techniques used in this case serve as a mutual check one on the other in the circumstances.

The Board accepts Mr. Borne's position that there is a three-car parking area and not a two-car parking area.

The assessor (and this Board) used the value arrived at by the cost approach since it favoured the taxpayer by approximately $1,500.00 to $2,000.00.

As stated before the difference between A-1 example and B-1 example in the assessor's valuation is the size of the subject lot and the Board therefore accepts the B-1 valuation of $154,900.00 as the appropriate valuation less the deductions below.

The Board has determined there ought to be a reduction for flooding. There is evidence of no reduction (by the Director) and between 10 - 15% averaged at 12½% (by Mr. Clarke). The Board has decided that for the reasons stated above there ought to be an allowance for the provisions of the railway cutting. Again the evidence appears to be 5% with the assessor saying that there should be no reduction. The Board feels that it should reduce the figure of $154,900.00 by a percentage figure for those two items and it believes that the percentage figure ought to be 11% (including both items). The calculations therefore are as follows:

$154,900.00 - 11%
17,039.00
$137,861.00 or rounded to $137,800.00

On the evidence given it, the Board allows the appeal and under Sections 38 and 39 of the Assessment Act then determines the assessment for the year 1984 at $137,800.00.

An Order will issue accordingly, without costs.

DATED at HALIFAX, Nova Scotia, this 3rd day of July, A.D., 1985.

RICHARD L. WELDON

MEMBER, NOVA SCOTIA
MUNICIPAL BOARD.

Hilchey v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--COST METHOD--MARKET VALUE APPROACH

This is an appeal from a decision of the Halifax City Regional Assessment Appeal Court confirming the Appellant's 1984 residential assessment in the amount of $44,400.00. The subject property is a single storey, wood frame home of prefabricated construction approximately 40 years old located on a lot approx. 40 ft. by 100 ft. in an area zoned R-2, General Residential Zone. The assessor estimated market value by the cost method to be $28,000.00 for the land and $16,102.00 for the building, for a total of $44,102.00, rounded to $44,100.00. By the market value approach, the assessor estimated the value to be approx. $50,000.00.

HELD: The Board allows the appeal and determines the assessment of the subject property to be $44,100.00.

The evidence of the assessor was more comprehensive and credible as to the market value of the subject property. The cost approach to value used by the assessor is an appropriate method for determining market value. This method was applied in a fair and logical way. The Appellant did not effectively rebut the evidence that market value for assessment purposes should be $44,100.00.

NSMB-105-84-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14 R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by VICTOR W. HILCHEY from a decision of the Nova Scotia Regional Assessment Appeal Court, Halifax City Assessment Region, concerning the assessment of the Appellant's property at 3377 Mic Mac Street, Halifax, Nova Scotia.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: DANIEL J. CLARKE, LL.B., for the Appellant

RANDALL DUPLAK, LL.B., for the Director of Assessment

DECISION

A hearing was held by the Board at the Expropriations Compensation Board Room, 1660 Hollis Street, Halifax, Nova Scotia on March 11, 1985, on an appeal by Victor W. Hilchey from a decision of the Regional Assessment Appeal Court dated October 22, 1984, which dismissed his appeal from an assessment of $44,400.00 respecting his residential property at 3377 Mic Mac Street, Halifax, Nova Scotia. The Notice of Appeal was dated November 23, 1984, and was received by the Board on the same day. No objections having been raised by the parties to the Board's jurisdiction to hear this appeal, the Board proceeded to hear the appeal on the merits.

The Notice of Appeal states that the grounds of appeal are the following:

> "(1) The Regional Assessment Appeal Court did not give proper weight or consideration to the evidence as prescribed by the Appellant.

(2) The Regional Assessment Appeal Court erred in its consideration of assessment values and principles applying to the house and lot in question.

(3) Such other grounds as may appear."

The property which is the subject of this appeal consists of a single storey, wood frame home of pre-fabricated construction, approximately 40 years old, located on a lot approximately 40 feet by 100 feet in an area zoned R-2, General Residential Zone. The property is situated in the northwestern area of peninsular Halifax, in a neighbourhood bounded by Chisholm Avenue to the north, Connaught Avenue on the east, Bayers Road on the south and Westwood Park on the west.

Evidence in this appeal was given by Mr. Hilchey, the Appellant, and by Mr. Joseph MacLean, the assessor of the property.

Mr. Hilchey explained the recent assessment history of his property. In 1978 he stated that his assessment increased by 73.4% but he did not appeal this assessment. In 1981, the assessment of his property increased to $39,100.00, which he appealed. Pursuant to Section 84 of the Assessment Act, the assessment was reviewed and reduced to $34,100.00 without the appeal going forward. Mr. Hilchey stated that he was not aware at that time, though he subsequently discovered, that this $5,000.00 reduction of his assessment in 1981 was an adjustment of the value of his land only. In 1984, Mr. Hilchey stated that his assessment increased by $12,800.00 or 37.54%. He appealed this assessment and again, pursuant to Section 84, on a review by the assessor, the interior of the house was inspected and the total assessment was reduced by $2,500.00. Mr. Hilchey did not, however, abandon his appeal because his assessment, now $44,400.00, contained a $10,000.00 increase on the value of his land which he contended was unfair. The decision of the Regional Assessment Appeal Court, which dismissed his appeal, was filed as Exhibit H-2 and reads as follows:

> "Mr. Victor Hilchey appeared accompanied by his solicitor, Mr. Dan Clark. Mr. Hilchey's home is a World War II prefab assessed at $44,400.00. It increased some $10,000.00 for its previous assessment and that increase is significantly higher than other similar properties in the neighbourhood. I am satisfied that the reason for this is that through a mistake Mr. Hilchey was given the benefit of a lower assessment at the time of the last general reassessment. His land was assessed by some $5,000.00 lower than virtually all of the other lots in his neighborhood. This error was rectified during the current general reassessment and in common with other similar properties his land increased a further $5,000.00. The value of his house alone did not increase at all. This explains the disproportion of the increase of his assessment. Mr. Hilchey also protested that his home was overassessed in terms of other properties in his neighborhood of which were improved while his had not been. In my opinion, the Assessor has considered the increment in value for improvements in the other homes and that the assessment of his property is not out of line. I therefore dismiss his appeal."

Mr. Hilchey gave evidence on the percentage increases in the 1984 assessments of three properties on Mic Mac Street which he felt were somewhat comparable to his own. (He stated that there had been no recent property sales on Mic Mac Street). The assessment of the property at Civic Number 3343 Mic Mac Street, which he felt had been extensively improved in comparison to his own, increased by $7,300.00 or 15.8% in 1984 according to Mr. Hilchey. The assessment of the property at Civic Number

3365 Mic Mac Street which consists of a larger six room house, also improved, increased by $4,400.00 from $53,600.00 to $58,000.00 or 8.21% in 1984 according to Mr. Hilchey. The assessment of the property at Civic Number 3371 Mic Mac Street, also improved, increased by $9,200.00 or 22.66% in 1984 according to Mr. Hilchey.

Mr. Hilchey stated that the only substantial improvement to his property since its purchase in 1955 was a furnace which was installed in 1961-62. Mr. Hilchey felt that a fair market value of his property as of January 1, 1983 would be approximately $42,000.00, which would be a 22% increase over the 1981 assessment and would therefore fall within the range quoted above of 8 to 22% increases in the assessment of more or less comparable properties on the same street.

In cross-examination, Mr. Hilchey was asked if he had been aware that the 1981 assessment of one of the comparable properties cited by him - 3365 Mic Mac Street - had been reviewed and reduced from $53,600.00 to $42,300.00. Mr. Hilchey acknowledged that this lowered 1981 assessment would alter the increase in assessment in 1984 which he had calculated to be 8.21% to an increase of 37%. Mr. Hilchey did not disagree that his assessment was the second lowest on Mic Mac Street, or that due to the alleged error which reduced the land value component of his assessment in 1981, he had benefited from reduced taxation in 1981, 1982 and 1983.

Mr. Joseph MacLean, a qualified assessor with the

Halifax City Assessment Region Office, assessed the subject property in 1983. In February, 1985, he inspected the property in the course of the preparation of his report dated March 4, 1985, which was filed as Exhibit H-3. Mr. MacLean explained how he had arrived at his determination of market value for assessment purposes of the subject property as of January 1, 1983, of $44,100.00 which is a reduction of $300.00 from the assessment confirmed by the Regional Assessment Appeal Court.

Mr. MacLean stated that he had calculated land value for the subject property by using a front footage value of $700.00 per front foot. This figure was calculated from front footage values in Ward 6 derived from property sale prices in the Ward in the years 1981 - 1983. Since the subject property corresponds to the standard lot size in the neighbourhood which is 40 feet by 100 feet, Mr. MacLean had not needed to adjust for variations of lot frontage or depth. He calculated the value of the land in the subject property as follows:
40 x $700.00 = $28,000.00.

In determining the value of the house on the subject property by the cost approach, Mr. MacLean used the Nova Scotia Assessment Manual together with a time-location modifier to estimate the reproduction cost as of January 1, 1983. In Mr. MacLean's opinion, the subject house fitted the 3B classification in the Manual which is defined as a house built from stock plans, with average or below average qualities of material and workmanship, cost having been the prime consideration. After calculating the value of the house to be $16,258.00

by multiplying the square footage (648 square feet) by the square foot value of a Class 3B house ($25.09 per square foot), Mr. MacLean made a number of adjustments for features characteristic of a 3B class house which were absent or of inferior quality in the subject house. These adjustments reduced the value of the house by $2,884.00 to $13,374.00. After applying the local modifier to adjust for time and costs and after deducting 30% for (curable) physical depreciation, Mr. MacLean arrived at a total building value of $16,102.00. This building value when added to the total land value of $28,000.00 resulted in a total value of $44,102.00, rounded to $44,100.00.

Mr. MacLean also calculated the value of the subject property by the market value approach using the sale price of three comparable properties adjusted for time and for the differences between those properties and the subject.

Comparable Sale #1, a property at Civic Number 3236 Connaught Avenue, was sold on March 28, 1983, for $59,000.00. The house is slightly larger than the subject, the lot deeper and it has warm air heat rather than hot water, and a finished attic area. Mr. MacLean calculated the adjusted sale price for comparable Sale #1 to be $49,917.00.

Comparable Sale #2, a property at Civic Number 2928 Connelly Street, was sold on August 16, 1982, for $56,000.00. The house is larger than the subject, has an enclosed entrance porch, a finished basement, warm air heating, and was considered by the assessor to be a 5% better grade house than the subject.

Mr. MacLean calculated the adjusted sale price for comparable Sale #2 to be $49,592.00.

Comparable Sale #3, a property at Civic Number 3187 Connaught Avenue, was sold on June 21, 1983, for $60,000.00. The house has a small enclosed porch, warm air heating and some finished basement area. Mr. MacLean calculated the adjusted sale price for comparable Sale #3 to be $51,621.00.

From the adjusted sale prices of the above three comparable properties, Mr. MacLean concluded that the "market value approach estimates the value of the subject to be approximately $50,000.00".

Mr. MacLean did not consider the income approach to value to be relevant in determining the value of the subject property because it is a single family residence rather than an income producing property; he did not apply that approach to the subject property. Having calculated an estimate of value by the cost approach to be $44,100.00 and an estimate of value by the market approach to be $50,000.00, Mr. MacLean chose to accept the cost approach estimate of value of $44,100.00. Mr. MacLean considered that the cost approach had the advantages of allowing separate valuation of house and property and of tending to produce a more uniform and standard approach to the valuation of property. In his opinion, the cost approach adequately took into account the market value of this property.

Mr. MacLean explained that an error had been made in 1981 in the land value of the subject property when an assessor other than the original assessor reviewed the assessment without inspecting the property. The subject property was one of three in the area whose land value was erroneously reduced from $23,000.00 to $18,000.00 at that time.

The Board has considered the evidence of the Appellant and the assessor and the oral argument made on behalf of each. While Mr. Hilchey gave evidence on the state of his property in comparison to others on his street, the Board considers that the evidence of the assessor was more comprehensive and credible as to the market value of the subject property. The Board considers the cost approach to value used by the assessor to be an appropriate method for determining the market value of the subject property and it appears to the Board that this method was applied in a fair and logical way. The Appellant did not effectively rebut the evidence given by the assessor that the market value for assessment purposes of the subject property should be $44,100.00. The Board therefore allows the appeal and determines the assessment of the property at 3377 Mic Mac Street to be $44,100.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of July, A.D., 1985.

E A Lawrence

ELIZABETH LAWRENCE
Vice-Chairman

Margolian v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--DIRECT SALE COMPARISON METHOD--INDIRECT SALES METHOD (REJECTED)--COST METHOD--UNIFORMITY OF ASSESSMENT--ASSESSMENT ACT, S.38

This is an appeal from a decision by the Annapolis-Digby Regional Assessment Appeal Court confirming the 1984 residential assessment of the Appellants' land and dwelling with attached garage in the Town of Digby in the amount of $108,000.00. The property was acquired in 1969 for $26,000.00, which included $4,000.00 worth of equipment. A balcony costing approx. $4,000.00 was added. Evidence on behalf of the Appellants estimated the market value for purposes of the 1984 assessment to be $85,000.00, by one appraiser, and $90,000.00, by another. The dwelling is insured for $107,000.00 based on replacement cost.

HELD: The Board allows the appeal and determines the 1984 assessed value of the subject property to be $106,000.00. The Board awards costs of $105.00 to the Appellants.

The subject property is one of the more expensive in Digby. There are about 12 such properties in Digby, and none have sold recently. Therefore it is not possible to estimate market value through sales of comparable properties. The properties selected on behalf of the Appellants are not sufficiently comparable to be a reliable estimate of market value of the subject property. The Board rejects the "indirect sales method" used by the assessors. This method is not sanctioned by the Appraisal Institute of Canada, does not have general application in Nova Scotia and does not conform to the methods approved in Montreal v. Sun Life Assurance Co. The cost method is generally accepted where there is inadequate data available on the sale of comparable properties and sufficient reliable cost information. The value is arrived at by valuing the land and adding to the land value the depreciated value of any improvements to the land. The weakness of the cost method is in estimating the various components of depreciation. The Board accepts the assessor's evidence that land value is $15,600.00 and that reproduction costs are $133,960.00. The assessor demonstrated a better knowledge and ability to use the cost manuals and has had many years experience costing residential properties in Digby. However, the assessor used 20% as representing physical depreciation. In the Board's opinion the rate should be 25%. The Board appreciates the Appellants' concern that the Rosenthal property is assessed for substantially less than his property. This is not a reason to reduce the assessment of the subject property. Uniformity of assessment is not an issue.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Ch. 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by Herbert and Elizabeth Margolian from a decision of the Regional Assessment Appeal Court, Annapolis - Digby Assessment Region.

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: IRVING PINK, Q.C., for the Appellants

MARIAN TYSON, LL.B., for the Director of Assessment

DECISION

This is an appeal by Herbert and Elizabeth Margolian from a decision of the Regional Assessment Appeal Court, Annapolis - Digby Assessment Region, made June 28, 1984 whereby the 1984 Assessment in the amount of $108,000.00 of the Appellants' residential property consisting of land and dwelling with attached garage located at Civic #180 Second Avenue, Digby, Digby Co., was confirmed.

The Appellants' Notice of Appeal is dated July 10, 1984 and it was received by the Board on July 13, 1984. There were no objections to the Board's jurisdiction to hear the appeal and the Board assumed jurisdiction to hear the merits of the appeal.

The Grounds of Appeal set forth in the Appellants' Notice of Appeal are as follows:

"1. THAT the learned Nova Scotia Regional Assessment Appeal Court in setting the assessment, failed to give due consideration and full weight to the evidence of the Appellants, showing the actual cash value of the said property.

2. THAT the assessment on the property is not in uniform in comparison to other properties in the same Municipality.

3. THAT the assessment is not in accordance with Section 38 of the Assessment Act.

4. Such other grounds as shall appear."

Witnesses on behalf of the Appellants were Herbert Margolian, one of the Appellants; John Englehutt and John Brittain, Real Estate Brokers.

The subject property was described by Mr. John Brittain at Page 3 of his Appraisal Report filed as Exhibit M-18 as follows:

> "The property covered under this appraisal is located between Second Avenue and Queen Street, and is numbered 180 Second Avenue in the town of Digby, Nova Scotia.
>
> The land slopes down from Second Avenue to Queen Street. Located on this lot, twenty-five feet back from Second Avenue, is a one storey dwelling containing a garage, seven rooms and a bath. With the exception of the garage and a small space under the back hall the basement is fully excavated and contains five rooms and a bath (toilet & sink only). These downstairs rooms are finished except for the room containing the pool table and bar. The furnace is exposed, as well as some heating pipes and the electrical conduit pipe.
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> The house is approximately 22 years old, and is modern in every respect except that the heating radiators are the old cast iron type. The heating is by a hot water oil furnace and a one hundred amphere electrical entrance supplies electricity to the house. Domestic hot water is heated by the furnace.
>
> One good aspect of the building is that, being on a slope, entrance to the basement at the rear is at ground level. There is a patio deck just off the den on the ground floor.

> The outside walls of the building are covered with brick veneer on the north end and about half of the front side. The rest of the walls are covered with wood shingles double thickness. The roof will need reshingling in approximately ten years.
>
> The interior of the house has been well kept and is in good condition. The floor plan is considered to be good. Floors are covered with woven rug (wall to wall) in the back hall, den and kitchen. The front hall, dining and living rooms are covered with deep pile rugs which are also wall to wall. One bedroom is rug covered while the other two have hardwood floors."

Herbert Margolian and his wife, Elizabeth, own the subject property as joint tenants. They acquired the property in 1969 for the sum of $26,000.00. The $26,000.00 purchase price included the land, dwelling and equipment. Mr. Margolian estimated the equipment value at $4,000.00 at the time of purchase. Mr. Margolian stated that since 1969 the dwelling has been painted twice, a balcony costing approximately $4,000.00 was added, carpet was laid in a portion of the basement and repairs were made to the concrete foundation. The dwelling was constructed in 1960 and Mr. Margolian stated that there have not been any major structural changes in the dwelling since he acquired it in 1969.

According to Mr. Margolian, the dwelling needs a new roof and gutters, and there are cracks in the wall and ceiling on the main level and in the basement level. Mr. Margolian estimated the cost of a new roof at $2,500.00 and the cost of new gutters at $1,200.00 to $1,400.00.

The dwelling is insured for $107,000.00 based on replacement cost. Mr. Margolian described his dwelling as a single floor house with a recreation room in the basement. He does his own landscaping.

Mr. Margolian said he appealed the 1984 assessment because he did not think he could sell his house for its assessed value of $108,000.00. He sought the opinion of two real estate brokers in the Town of Digby on the market value of his property and he was advised by Mr. John Englehutt that the market value of his property was $85,000.00 and by Mr. John Brittain that the market value of his property was $90,000.00.

Mr. Margolian also compared the assessment of his property with the assessments of other properties in the Town of Digby and in his opinion, the assessment of his property is too high when compared to other comparable properties in the Town. He made reference to the assessment of the Jack Rosenthal property, which is assessed at $93,600.00 for the 1984 assessment year. Mr. Margolian stated that the Rosenthal property is ten years newer than his property, has a larger dwelling area than his property and is a better dwelling than his dwelling. According to Mr. Margolian, in prior years his property assessment has always been within $600.00 of the Rosenthal property assessment.

Mr. Margolian also referred to the assessment of the Ritchie property which he said was always assessed higher than his property but in 1984 was assessed at $99,200.00 which is $8,800.00 less than his property assessment.

Finally Mr. Margolian referred to the assessment of the Everett Hall property which he said is three years old, has a larger dwelling area and land area than his property and contains office space as well as residential space. This property is assessed at

$115,000.00 and in Mr. Margolian's opinion, its market value is more than $7,000.00 greater than his property.

Mr. Margolian also reviewed the history of the assessment of his property. In 1969 the value for assessment purposes was $15,700.00. This value was increased to $29,000.00 in 1972; to $62,500.00 in 1977; to $74,100.00 in 1979, lowered on appeal to $67,700.00; to $69,400.00 in 1980 with the addition of the balcony; to $95,400.00 in 1981, subsequently lowered to $90,000.00 on appeal; and finally to $108,000.00 in 1984.

Mr. John Englehutt is a Real Estate Broker and President of John's Real Estate Limited. He has 12 year's experience in the real estate business. He has resided in the Town of Digby since 1970. Prior to becoming a Real Estate Agent and Broker, he was a Bank Manager in the Town of Digby. Mr. Englehutt says that he consistently sells 40 to 50 homes per year and in 1983 he sold 61 homes. His Company serves the Town of Digby and an area within a 20 mile radius of the Town. Mr. Englehutt said he also has been appraising residential property for the last 12 years. He is the area appraiser for the Royal Bank of Canada for residential mortgage purposes and he has done residential property appraisals for mortgage purposes for Nova Scotia Savings and Loan and for League Savings and Mortgage Company as well as residential property appraisals for insurance purposes. He has not taken any formal appraisal courses although he has attended seminars put on by the Appraisal Institute of Canada.

Mr. Englehutt estimated the market value of the subject property for purposes of the 1984 assessment to be $85,000.00. In arriving at his estimate of market value, Mr. Englehutt used both the market data method and the cost method and in his final analysis he relied on his estimate of market value produced by the market data method.

Mr. Englehutt estimated the market value of the subject property by the market data method to be $85,000.00. In arriving at this estimate of market value, he analyzed the sales of four properties which he considered comparable to the subject property and the listing of a fifth property which had not sold at the time he was preparing his appraisal report. He rated these properties as either good or fair in their degree of comparison with the subject property.

The first comparable property considered by Mr. Englehutt is located at 177 Queen Street immediately adjacent to the subject property and it sold in June, 1983 for $89,000.00. This property contains a large older home which had been recently renovated and a land area of .63 acres. Mr. Englehutt considered this property to be a better property than the subject property and the degree of comparability is fair.

The second comparable, located at Deep Brook, Digby Co., contains 10½ rooms and 2½ baths situate on 2.8 acres of land. This property sold in May, 1983 for $80,000.00. Mr. Englehutt rated the degree of comparability of this property with the subject property as good.

The third comparable located at Bayview, Digby Co., contains a two-storey dwelling with 8½ rooms and 1½ baths, paved driveway, landscaping and is situate on 4.04 acres of land. This property sold in July 1983 for $68,000.00 and Mr. Englehutt considered the degree of comparability with the subject property as good.

The fourth comparable located on the Lighthouse Road in the Town of Digby contains a dwelling with 9 rooms and a bath situate on one acre of land. The dwelling is a bungalow style and it was less than two years old when it sold in July, 1982 for $73,000.00. Mr. Englehutt considers this property to be a good comparable with the subject property.

The fifth comparable known as the MacDormaid property located on Queen Street in the Town of Digby is listed for sale at $80,000.00. The property has .22 acres of land and a dwelling containing 9 rooms and 2 baths. It is assessed at $84,000.00 for the 1984 assessment year. Mr. Englehutt considered this property to be a good comparison to the subject property.

Based on his analysis of the sale prices and listing price of the above properties and their degree of comparibility with the subject property, Mr. Englehutt estimated the market value of the subject property to be $85,000.00.

Mr. Englehutt also prepared a schedule which was included as part of his Appraisal Report, filed as Exhibit M-5, listing 7 properties in the Town of Digby with their 1984 assessed values. He rated these properties as either better, slightly less valuable or comparable with the subject property. The purpose in preparing this schedule was to show that the subject property was assessed too high in comparison with the assessed value of these properties. For example - one of the properties in the schedule was the Everett Hall property which is assessed at $115,000.00. Mr. Englehutt stated that the market value of the property was $30,000.00 greater than the market value of the subject property and therefore the subject property's assessment of $108,000.00 was too high.

Mr. Englehutt had varying degrees of knowledge of the size, condition and quality of materials of each of these properties. He was very familiar with two of the properties because he appraised them on prior occasions. His knowledge of the remaining properties was based on general observations of their exterior features, construction and condition.

On cross-examination, Mr. Englehutt said that in order to use the market data method, it is not essential that properties selected for comparison be similar to the subject property. He agreed that location is important when comparing properties. He also stated that although he did not make specific adjustment to the sale price of the comparables to account for the difference in market value between the time of the sale of the comparable and the effective date for determining the assessed value of the subject property, he considered this factor in arriving at his final opinion of market value of the subject property. He said he selected the properties listed in his report for comparison to the subject property because these properties were the best properties available for comparison to the subject property.

Mr. Englehutt estimated the market value of the subject property by the cost method to be $82,843.00. He estimated the land value to be $15,600.00 and the depreciated building value to be $67,243.00.

Mr. Englehutt agreed with the assessor's opinion that the market value of the land was $15,600.00. He did not provide any data in support of his opinion of land value.

In estimating the depreciated building value, Mr. Englehutt used Boeckh's Building Valuation Manual to determine the reproduction cost of the dwelling and updated the costs shown in the Manual which was prepared in 1976 by the use of a costing index supplied by Boeckh's. He arrived at an estimated reproduction cost of the dwelling for 1984 in the amount of $114,945.00. He then applied a rate of 35% for physical depreciation and a rate of 10% for obsolescence to arrive at a depreciated dwelling value of $67,243.00.

In arriving at his estimate of 35% for physical depreciation Mr. Englehutt followed the suggested depreciation guidelines found in Boeckh's Building Valuation Manual for a dwelling 24 to 28 years old in average condition.

His 10% estimate for obsolescence is the same rate used by the assessor for obsolescence and was intended as an allowance for the loss in market value due to the fact that the building was larger than most homes in the area and therefore would not be as desireable to sell.

On cross-examination, Mr. Englehutt said that he had not taken any course or training in the use of Boeckh's Valuation

Manual. He also was not familiar with the Residential Costing Manual used by the Assessment Division of the Department of Municipal Affairs. Mr. Englehutt was questioned by Counsel for the Director on how he arrived at his cost estimates for various components in the subject dwelling and he had difficulty in explaining the source and basis for some of his estimates. He also had not properly adjusted some of the costs of the subject dwelling for difference between the subject dwelling and the model he used in Boeckh's Building Valuation Manual.

According to Mr. Englehutt, the market value of residential properties in the Town of Digby in the period January 1, 1981 to December 31, 1983 increased by approximately 6%. He said that high interest rates in 1981 and 1982 limited the increase in market value of residential properties in these years while in 1983, the increase in market value was approximately 5%. Mr. Englehutt said that these estimates were based on his experience selling real estate in the Digby area during these years and that he did not prepare a detailed report listing real estate sales and price changes during this period.

John Brittain is a retired Real Estate Broker who has 26 years experience selling Real Estate in the Digby area. He also carried out appraisals on residential properties in Digby County and other counties in western Nova Scotia during this period. He attended courses put on by the Appraisal Institute of Canada in Halifax in 1971 and 1972. Although he has been retired from the real estate business for the last 8 years, he said he keeps involved in the business on a part-time basis. Mr. Brittain said that in the last two years, he has done six to eight appraisals which he characterized as being of the "more difficult" type.

At Page 2 of his Appraisal Report filed as Exhibit M-18 Mr. Brittain concludes:

> "After having inspected the property and making comparisons of recent sales in the area, it is my opinion that this property would have a market value of:
>
> $90,000.00
>
> The term market value, as used in this appraisal, means "the highest price estimated in terms of money which a property will bring if exposed for sale on the open market, allowing from 90 to 120 days to find a purchaser with knowledge of the uses the property can be put to"."

Mr. Brittain selected four properties, three of which sold and one which is listed for sale, for comparison purposes in order to estimate the market value of the subject property.

Sale No. 1 includes an eight room house with two bedrooms located on the Lighthouse Road, just outside the Town of Digby. This property was listed for sale for five months before selling in 1983. It was originally listed for sale at $83,000.00 and sold for $73,000.00.

Sale No. 2 is a property containing a new cedar home located on the Shore Road in the Municipality of the County of Digby but close to the Town Boundary. This property sold in 1983 for $65,000.00 after being listed for sale for three months.

Sale No. 3 is the MacKenzie property which is located next to the subject property. It was exposed to the market for two years and had been originally listed for sale at $120,000.00. It eventually sold in June 1983 for $89,000.00. Mr. Brittain discounted the sales price of $89,000.00 by 10% because of the time it took to sell the MacKenzie property. He said "most mortgage companies ask for a valuation that could be realized in from 90 to 120 days" and "any longer time lapse than this would reduce the value of the property by the amount of interest it would cost to hold the home until a sale could be realized". Mr. Brittain considered the subject property to be a better property than the MacKenzie property.

Sale No. 4 is a property on Queen Street in the Town of Digby which has been on the market for two years. It had been originally listed for sale at $100,000.00. The current asking price is $85,000.00.

Mr. Brittain considered the subject property to be superior to the four comparables mentioned above.

Mr. Brittain also prepared a "rough" estimate of market value of the subject property by the cost method. He was informed by two local building contractors that it would cost between $40.00 and $55.00 per square foot to build a "better than average home". Using $45.00 per square foot to construct the dwelling, $20.00 per square foot to construct the balcony and $9.00 per square foot for finish in the basement, Mr. Brittain arrived at an estimated reproduction cost for the subject dwelling of

$106,500.00. Based on his observation of the condition of the dwelling, he would allow a rate of 30% for physical depreciation. This resulted in a depreciated building value of $74,550.00 which he rounded to $74,500.00. Mr. Brittain estimates the land value to be $15,000.00. Adding the land value of $15,000.00 and the depreciated building value of $74,500.00 he arrived at $89,500.00 as his estimate of market value by the cost method. Mr. Brittain stated that this rough estimate of market value by the cost method supported his opinion of market value of $90,000.00 arrived at by the market data method.

Mr. Brittain said that the result arrived at by the cost method is not relied upon if it produces a value greated than the value arrived at by the market data comparison method.

He also stated that in his opinion real estate prices for higher priced properties in the Town of Digby did not increase by 20% in the years 1981 to 1983 as suggested in the assessor's report.

Mr. Brittain said that there are probably no more than 12 homes in the Town of Digby in the $90,000.00 to $100,000.00 price range. He considered this to be an adequate number of expensive homes for the Digby Real Estate Market but he emphasized that there is a lack of buyers for these properties.

On cross-examination Mr. Brittain agreed that when choosing other properties to compare to a particular property to assist in determining the market value of that property it is important to consider the size of the properties, their layout, the quality of materials and workmanship used in constructing the dwellings, their age and the size and type of land. He said that in many instances, it is difficult to weigh all these factors separately and the final determination of value is what does the buyer want and what is he willing to pay.

Evidence on behalf of the Director was given by Eric Cox and Murray Harris. Eric Cox, N.S.I.A., an Assessor in the Annapolis-Digby Assessment Region has been assessing property in the Town of Digby and the Municipality of the County of Digby for the last twelve years. He prepared the assessment report relating to the subject property filed as Exhibit M-4.

Mr. Cox estimated the market value of the subject property by the cost method to be $112,627.00 and by the indirect market method to be $108,000.00. His opinion of market value of the subject property for purposes of the 1984 assessment purposes was $108,000.00.

Mr. Cox did not use the market data method to estimate the market value of the subject property because he said there were no sales of properties comparable to the subject property in the Town of Digby. Mr. Cox said that when he was looking for properties which have recently sold to compare to the subject property, he looked for similarities in the size of the dwelling, quality of material and workmanship used in construction, land areas and location. He said that he would not consider properties outside the town to compare to the subject property because there is a different market for properties in the Town and properties in the Municipality.

Mr. Cox stated that he physically examined the subject property prior to the Regional Assessment Appeal Court hearing and again prior to the current hearing. In his opinion, the dwelling is in very good condition for its age. He did not see any visible signs of wear on the exterior of the dwelling and the grounds were well maintained. He said it is his practice in examining the interior of a dwelling to look for general maintenance of the dwelling and cracks in the wall and ceiling and around the windows. He said he noticed hairline cracks in the walls over the fireplace and over the bathtub. He said the lower level was well maintained with no observable signs of wear and tear. In his opinion, the quality of materials used in constructing the dwelling was very good.

In estimating the value of the subject property by the cost method, Mr. Cox placed the subject dwelling in the category of a Class 1B dwelling which he explained is a high quality house featuring good materials and workmanship. He said there is only one category higher than a Class 1B dwelling. Mr. Cox then used the Nova Scotia Residential Assessment Manual as a guide in determining the reproduction cost of the subject dwelling and attached garage. He felt that the property was not quite up to the features and specifications of a Class 1B property but it was better than a Class 1C property. He therefore reduced the reproduction cost for the subject dwelling as determined by the Nova Scotia Residential Assessment Manual for a Class 1B property by 10%. He updated the costs shown in the Manual which was prepared in 1976 by the use of a costing index supplied by Boeckh's. Mr. Cox said the Nova Scotia Residential Assessment Manual is used in the assessing of all residential properties in the Town of Digby.

Mr. Cox arrived at an estimated reproduction cost for the dwelling in the amount of $129,537.00 and for the garage, in the amount of $4,423.00. He applied physical depreciation at the rate of 20% to the dwelling based on his opinion that the dwelling was in very good condition and was approximately 19 - 23 years old. His rate of 20% is taken from the normal depreciation guideline table in the Nova Scotia Residential Assessment Manual. He also stated that Mr. Margolian's comments about the condition of the roof of the dwelling would not alter his opinion on the rate of physical depreciation to be applied.

He applied a rate of 10% to the depreciated dwelling costs as an obsolescence allowance to take into account the loss in market value due to the undesireably large size of the dwelling. His estimated depreciated reproduction cost for the building was $93,267.00.

He applied physical depreciation at the rate of 15% to the garage which resulted in a figure of $3,759.00 as the estimated depreciated reproduction cost of the garage. His estimate of land value was $15,600.00 and it was based on calculations prepared by Murray Harris, the Director of Assessment for the Annapolis-Digby Assessment Region.

Adding the depreciated dwelling of $93,267.00, the depreciated garage value of $3,759.00 and the land value of $15,600.00 Mr. Cox arrived at $112,627.00 as the estimated value of the subject property by the cost method.

Mr. Cox reviewed the comparable properties chosen by Mr. Englehutt and Mr. Brittain and gave his reasons why he did not consider these properties similar to the subject property for purposes of estimating a market value for the subject property.

The property at 177 Queen Street was constructed over 100 years ago and according to Mr. Cox, is placed in a different costing category for assessment purposes than a modern home such as the subject property. The MacDormaid property also located on Queen Street in the Town of Digby was not considered comparable because it was built in 1940 and it has a smaller dwelling area than the subject dwelling. Mr. Cox did not consider the property on the Lighthouse Road comparable because the dwelling contains only 1,096 sq.ft. of living area versus over 1,900 sq.ft. for the subject dwelling and the materials used in construction were not as good as the materials in the subject dwelling. The properties located outside of town were rejected by Mr. Cox as comparable because land values would be less in these areas and the dwellings were smaller and not as well constructed as the subject dwelling.

Mr. Cox said the 1984 assessment of the Rosenthal property was similar to the Margolian property. The Regional Assessment Appeal Court reduced the assessment of the Rosenthal property but did not reduce the assessment of the Margolian property. Mr. Cox said he was not familiar with the 1984 assessment of the Rosenthal property and he could not explain why that property's assessment was reduced by the Regional Assessment Appeal Court.

Murray Harris, N.S.I.A. is the Director of Assessment for the Annapolis-Digby Assessment Region. Mr. Harris prepared the *land sales analysis which* was used to establish land values for the 1984 reassessment in the Town of Digby. Mr. Harris stated that in the general neighbourhood of the subject property a vacant lot with frontage on two streets sold on March 26, 1983, and the indicated land value from this sale was $59.04 per front foot. The land value of the subject property was set at $60.00 per front foot. The total number of front feet of the subject property was 260. Multiplying the total number of front feet (260) by the front foot value ($60.00) produces a land value for the subject property of $15,600.00.

Mr. Harris also prepared an analysis of residential properties in the Town of Digby which sold two or more times during the period January 1, 1980 to January 1, 1983. According to Mr. Harris, there were 190 such properties. For purposes of his analysis he divided the initial sales price of these properties into categories of $10,000.00, that is, $1.00 - $10,000.00, $10,001.00 - $20,000.00, etc., up to and including the final category of $100,001.00 and over. He determined an average annual percentage increase for each category based on the number of sales in each category. The annual percentage increase in the $1.00 - $10,000.00 category was 22.7% while the annual percentage increase in the $50,001.00 - $60,000.00 category was 8.66%. The annual percentage increase in each succeeding category was lower than the previous category.

There were no properties exceeding the value of $70,000.00 which sold twice during the period of January 1, 1980 to January 1, 1983. Mr. Harris calculated the annual percentage increase in each category above $70,000.00 by projecting the increase in these categories based on the price increases in the previous categories. By this method, he estimated the annual percentage increase in property values for properties in the $90,001.00 - $100,000.00 range at 7.06% or approximately 21% over three years which he rounded to 20%.

Mr. Harris accepted the assessed value of $90,000.00 determined by the Regional Assessment Appeal Court in 1981 as the market value of the subject property on January 1, 1980, the effective date for valuing the subject property for the 1981 assessment year. He increased that value by 20%, the percentage increase he determined for the period January 1, 1980 to January 1, 1983, in order to get the market value of the subject property on January 1, 1983, the effective date for determining the market value of the subject property for the 1984 assessment year. By this process, he arrived at a market value of $108,000.00 ($90,000.00 + 20% of $90,000.00) for the subject property for the 1984 assessment year.

Mr. Harris disputed some of the costs used by Mr. Englehutt in his cost method. Mr. Harris said the area of the subject building was 2,168 sq.ft. and Mr. Englehutt used 2,088 sq.ft. for his cost calculations which would have the effect of understating the total of his replacement cost. He also disagreed with Mr.Englehutt's method for determining wall costs and said that Mr. Englehutt should have added more costs for the basement finish. He further disagreed with Mr. Englehutt's selection of a costing category which was a less expensive category than the one chosen by Mr. Cox.

At Page 17 of his assessment report, Mr. Cox explains how he arrived at his final opinion of market value of the subject property.

> "The test of value within this report has indicated an estimate of market value of the subject property. This value is supported by analysis and valuation criteria.
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> A summary of value estimates produced the following:
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> | | | |
> |---|---|---|
> | Cost Approach | - | $112,000 |
> | Indirect Market Approach | - | $108,000 |
>
> The Cost Approach has produced the highest estimate of value. The land value as estimated and used in the Cost Approach was derived from market comparison and is felt to be quite reliable. The figures employed in the replacement cost of the subject are considered to be reliable. Depreciation estimates require a degree of subjective judgement and cannot be factually supported. However, reasonable guidelines have been established with regards to same and have been applied within this Assessment Region. The guidelines can be altered where the assessor considers necessary changes are warranted.
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> After having accepted the 1981 Regional Assessment Appeal Court Decision setting the Market Value on the subject property and accepting the 20% increase in property value from January 1, 1980 to January 1, 1983 as determined by the Director, the resultant value was established at $108,000."

Counsel for the Appellants argue that the assessors at no time during the hearing expressed an opinion of market value in accordance with Section 38 of the Assessment Act, c.14, R.S.N.S. 1967 as amended. Counsel for the Appellants submit that the cost method used by the assessors is a means of achieving uniformity of assessment but Section 38 requires the assessor to look to the market and determine a market value based on a sale by a willing seller to a willing buyer. Counsel for the Appellants also submit that the subject property should be assessed in the same amount as the Rosenthal property. Counsel for the Appellant argues that both properties are comparable and their assessed values were always similar until the decision of the Regional Assessment Appeal Court to lower the 1984 assessment of the Rosenthal property and not lower the 1984 of the Margolian property.

Counsel for the Appellants submit that the Board accept the evidence of market value of Mr. Englehutt and Mr. Brittain. Alternatively, he submits that the Board should not determine an assessed value greater than $93,600.00, the assessed value of the Rosenthal property.

The subject property is one of the more expensive properties in the Town of Digby. In the opinion of Mr. Brittain there are approximately 12 such properties in the Town and he considered the subject property to be one of this group. None of these more expensive properties have sold recently. Therefore, it is not possible to estimate the market value of the subject property through comparison with the sale of one of these more expensive properties.

The Board agrees with the assessor, Mr. Cox, that the properties selected by Mr. Englehutt and Mr. Brittain are not sufficiently comparable to the subject property to be able to determine a reliable estimate of market value of the subject property. There were substantial differences in the size of the dwelling area, construction materials and design and location between the comparable properties chosen by Mr. Englehutt and Mr. Brittain and the subject property. Although both Mr. Brittain and Mr. Englehutt are experienced real estate salesmen, there was no evidence adduced, other than their subjective opinions, to show how they adjusted the sale prices of the comparables to account for differences with the subject property. It is interesting to note that one of the properties chosen by Mr. Englehutt and Mr. Brittain for comparison to the subject property was the MacKenzie property which is located next to the subject property. This property sold in 1983 for $89,000.00. Mr. Brittain considered the MacKenzie property to be inferior to the subject property while Mr. Englehutt considered the MacKenzie property to be superior to the subject property. This difference of opinion emphasizes the unreliable nature of an analysis of sale prices of properties not comparable to the subject property.

In the opinion of the Board there were no properties sufficiently comparable to the subject property adduced in evidence to enable a reliable estimate of market value of the subject property to be determined by the direct sale comparison method.

The Board also rejects the "indirect sales method" used by the assessors. Use of this method to determine a market value is not sanctioned by the Appraisal Institute of Canada and it does not have general application in the Province of Nova Scotia. Further, it does not conform to any of the methods of valuation approved in the case of Montreal v. Sun Life Assurance Company of Canada, (1952) 2 D.L.R. 81 (J.C.P.). The use of this method seems to be a local practice of the assessors in the Annapolis - Digby Assessment Region. In the opinion of the Board, the assessors should restrict themselves to valuing property for assessment purposes in accordance with generally accepted appraisal methods.

The cost method is a generally accepted method by appraisers and assessors for use in estimating the market value of residential properties. Where there is inadequate data available on the sale of comparable properties and sufficiently reliable cost information, the cost method is an accepted method to determine the market value of a property.

The value by the cost method is arrived at by valuing the land and adding to the land value the depreciated value of any improvements to the land. The weakness of the cost method is in estimating the various components of depreciation.

The Board accepts the assessors' evidence that the land value of the subject property is $15,600.00. Mr. Englehutt agreed with the assessors' conclusion on land value and Mr. Brittain used a land value of $15,000.00 in his cost approach. The land value was arrived at by the assessor after an analysis of a vacant land sale in the general neighbourhood of the subject property.

The Board also accepts the evidence of the assessor, Mr. Cox, on the reproduction cost of the dwelling and attached garage. Mr. Cox estimated the reproduction costs of the dwelling and garage at $133,960.00, Mr. Englehutt at $114,945.00 and Mr. Brittain at $106,500.00. The reproduction cost of the dwelling for insurance purposes is $107,000.00.

There was no evidence adduced to show how the $107,000.00 figure for insurance purposes was calculated or whether it represented a certain percentage of the reproduction cost of the dwelling. The reproduction cost estimate put forward by Mr. Brittain was a very rough estimate of the cost of a "better than average home" and in the opinion of the Board did not attempt to estimate with any degree of accuracy the reproduction cost of the subject dwelling. The difference between Mr. Cox's estimate of reproduction cost and Mr. Englehutt's estimate is approximately $19,000.00. Mr. Cox's cost estimates were not disputed or otherwise shown to be in error except to the extent that Mr. Englehutt arrived at a lower reproduction cost using a different cost manual. The Board has no difficulty in accepting Mr. Cox's evidence on reproduction cost over Mr. Englehutt's evidence because Mr. Cox demonstrated a better knowledge of an an ability to use the cost manuals in estimating the reproduction cost of the subject dwelling than Mr. Englehutt. This is due to the fact that Mr. Cox has had many years experience costing residential properties in the Town of Digby as part of his duties as an assessor while Mr. Englehutt, by his own admission, was using the Boeckh's costing manual for the first time and lacked experience in the use of costing manuals.

As stated earlier, the weakness in the cost method is in estimating the amount of depreciation. Witness the fact that Mr. Cox applied a rate of 20% for physical depreciation, Mr. Brittain 30%, and Mr. Englehutt, 35%. Mr. Cox rated the subject dwelling as "very good" and because its age was 23 years at the effective date of the 1984 assessment and within the 19-23 year range set out in the normal depreciation table guidelines of the Nova Scotia Residential Assessment Manual, applied the suggested depreciation rate of 20%. He further thought a 20% rate was adequate even if the roof and gutters needed replacement. The Rating of "very good" is described in the depreciation guideline tables as "slight evidence of deterioration, quite attractive and desireable". The rating of "good" is described as "minor deterioration visible, attractive, desireable and useful". The suggested depreciation allowance for a "good" property, 19-23 years old, is 25%.

In the opinion of the Board, the rate of physical depreciation should be 25% to take into account the deterioration visible in the roof and gutters of the dwelling. In the opinion of the Board, Mr. Englehutt's estimate of 35% is too high. His estimate is based on depreciation guidelines in Boeckh's Costing Manual for a dwelling 24-28 years old in average condition. The subject property is 23 years old and even according to Mr. Brittain, is in better than average condition. Mr. Brittain's estimate of 30% appears only to be a rough estimate of the rate of physical depreciation since he did not do a detailed estimate of market value by the cost method.

The Board determines the market value of the subject value of the subject property by the cost method as follows:

Building Value	
Replacement Cost	$133,960.00
Less	
Physical depreciation 25%	33,490.00
	$100,470.00
Less - obsolescence 10%	10,047.00
Building Value	$ 90,423.00
Land Value	15,600.00
Property Value	$106,023.00
Rounded to:	$106,000.00

The Board appreciates the Appellant's concern that the assessment of the Rosenthal property is now substantially less than the assessment of his property. However, the fact that the assessment of the Rosenthal property was reduced is not a valid reason to reduce the assessment of the subject property. The issue of uniformity of assessment is not an issue in this appeal. In the case of Hebb v. Town of Lunenburg (1979) 32 N.S.R. (2d) 427 (NSCA) at Page 435-6 McKeigan, C.J.A. quoting Chief Justice Illsley, in Re Mindimar Metals Corporation and Municipality of the County of Richmond (1953), 33 M.P.R. 75 (N.S.C.A.) said:

> " The uniformity that is thus dominant and controlling is not, however, uniformity unrelated to "actual cash value". "Uniformity" is not to be based on some general community or judicial standard of fairness or value or comparability.
>
> The test of uniformity arises where, as Chief Justice Ilsley said in Mindamar, supra, there is a "general level of assessed value of other properties which bore a lower ratio to the actual cash value thereof than the ratio of the assessed value to the actual cash value of the property whose assessment is complained of."

There was no evidence presented by the Appellants to show that the general level of assessment of properties in the Town was lower in relation to their market value than the assessment of the subject property.

The Board does not agree with the assertions of Mr. Englehutt and Mr. Brittain that because there has not been a sale of a residential property in the Town of Digby exceeding $89,000.00 and some properties listed for $100,000.00 and over have not sold, the market value of the subject property is less than $100,000.00.

The market for more expensive properties is smaller than the market for less expensive properties and therefore it may take longer to sell a more expensive property. Also the properties listed for $100,000.00 and above may have been over-valued when first placed on the market.

The Board allows the appeal and determines the assessed value of the subject property for the 1984 assessment year at $106,000.00.

The Board awards costs of $150.00 to the Appellants. Although the Board accepted much of the evidence of the assessor, the Appellants were successful in reducing their assessment and are entitled to costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of July, A.D., 1985.

DARRYL W. WILSON

Ackles v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--COST APPROACH--DIRECT SALES COMPARISON APPROACH--ASSESSMENT ACT, S. 100(1)

This is an appeal from a decision of the Cumberland Regional Assessment Appeal Court which reduced the 1984 residential assessment of the Appellants' house and lot located in the Town of Amherst from $27,500.00 to $25,000.00. The house is 1½ storeys with a one storey bathroom addition, in excess of 90 years old and in poor condition. The Appellants purchased the property in 1980 for $20,000.00.

HELD: The appeal is dismissed without costs.

The Appellants have not discharged the onus on them to prove that the value of the property should not be $25,000.00. The Board would have difficulty accepting the opinions offered on behalf of the Appellant that the market value should be about $19,000.00 when the Appellants purchased it privately in 1980, after it had been appraised, for $20,000.00. The evidence of the assessor as to a market value of $25,000.00 is credible both in method and in application.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by **ROBERT ACKLES** and **MARLENE ACKLES** from a decision of the Regional Assessment Appeal Court, Cumberland Assessment Region, on a property located at 28 Eddy Street, Amherst, Nova scotia.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman.

COUNSEL: BRIAN S. CREIGHTON, LL.B, for the Appellants,

W.M. WILSON, LL.B, for the Director of Assessment.

DECISION

A hearing was held on September 6, 1984, in the Council Chambers of the Town of Amherst on an appeal by **ROBERT** and **MARLENE ACKLES** from a decision of the Regional Assessment Appeal Court, Cumberland Assessment Region, dated April 2, 1984, which reduced the assessment of a house and lot located at 28 Eddy Street, Amherst, from $27,500.00 to $25,000.00. Notice of Appeal (Exhibit A-1) dated June 1, 1984 and received by the Board June 4, 1984, cited the following grounds of appeal: [...that the Court:]

"1. Failed to take into consideration and give proper weight to the condition, size and age of the subject property;

2. Failed to consider and give proper weight to the assessment of properties of a similar nature in the area;

3. Failed to consider and give proper weight to the market value of the property and market value of other properties of similar nature in the area."

Counsel for the Appellant filed Affidavits of Service of the Notice of Appeal on the Clerk of the Board, the Director of Assessment, the Recorder of the Regional Assessment Appeal Court and the Clerk of the Town of Amherst as required by Section 100(1) of the Assessment Act. Both parties agreed that the appeal was properly before the Board and the Board proceeded to hear the appeal on the merits.

Counsel for the Appellant called one of the Appellants and two other witnesses. Counsel for the Director called the Assessor to give evidence.

Mr. Garnet Angus, a resident of Amherst, gave evidence as a real estate appraiser in the local area. Mr. Angus does not have appraisal institute qualifications but has appraised for banks, mortgages and estates in the area for 30 years. Mr. Angus was engaged by the Appellants on May 28, 1984, to appraise the subject property. His appraisal of the same date was filed as Exhibit A-6.

Mr. Angus estimated that the lot size of the property at Civic Number 28 Eddy Street was 55 feet x 92 feet or 5,060 square feet in size and that the lot size was average for the area.

Mr. Angus believed the house to be 90 - 100 years old. He described it as being in poor condition and in need of interior repair. His appraisal rated the exterior condition of the house as good but the interior condition as poor. Architecturally, Mr. Angus rated the appearance of the house as good, and similar to adjoining properties. Mr. Angus considered that the house was a 1½ storey building with a mixed concrete stone and brick foundation, and an asphalt shingle roof in satisfactory condition. The partial open basement he described as 16 feet by 36 feet and 17 feet by 28 feet, containing a gravity hot air furnace converted to oil. The plumbing fixtures were standard in his opinion and the floors were variously softwood, carpeted or vinyl tile.

Mr. Angus valued the land (5,060 square feet) at $0.60 per square foot, for a total land value of $3,036.00.

Mr. Angus valued the house on the property by the reproduction cost method. He applied $45.00 per square foot to the 1½ storey portion of the house and $15.00 per square foot to the 36 square foot one storey bathroom addition for a total value of $47,880.00. To this figure he added the value of 2 porches of 133 and 80 square feet respectively to which he applied a value of $10.00 per square foot. The total value of these improvements was $2,130.00. The total value of land, building and improvements was thus calculated to be $53,046.00.

Mr. Angus applied a 68% depreciation allowance to the building which resulted in a total market value of $19,040.00 The "special comments" by Mr. Angus on his report, Exhibit A-6, are as follows:

> "This is an old (90 years plus) one and one half storey house - it consists of kitchen, double living room, and bath on first floor and three bedrooms and one other room and a bath on the second floor.
>
> The roof is good and the exterior is fair. The interior is in poor condition and needs complete redecorating - floor coverings are poor.

> The old foundation is made up of stone, brick and cement and the basement is poor and has a mud floor. The property is not very saleable in its present condition. Wiring and plumbing need updating - heating is by an old brick wood furnace converted to use oil and it is obsolete."

Mr. Angus' appraisal contained some market data on two residential properties which had been sold recently. Both properties were multi-unit dwellings. The property at 43-45 Havelock Street sold in 1983 for $18,000.00 The house contained 12 rooms and two bathrooms on a 6,000 square foot lot. It was in fair condition. The property at 60 Havelock Street sold in 1984 for $33,000.00. The house contained 14 rooms and 2 bathrooms and was divided into 2 apartments. Mr. Angus considered it to be in fair condition. Both properties are approximately 1/3 - 1/2 mile away from the subject property.

Under cross-examination, Mr. Angus acknowledged that he had not inspected the attic of the house on the subject property. He had described it to be a 1½ storey house rather than a 2 storey house although he was not certain whether it met his definition of a 2 storey house - no sloping walls in the second storey and an attic of the same square foot size as the ground floor.

Mr. Angus stated that he had used Royal Bank building cost scales with which he was familiar to arrive at the reproduction cost for the house at 28 Eddy Street. According to Mr. Angus, $45.00 - $55.00 was the average square foot building cost in the area and he had used the lowest figure because of the old and obsolete heating system in the house.

Mr. Angus acknowledged that he had not used comprehensive comparables in the two properties on Havelock Street since both were rental income properties rather than single family homes, and that he had not made any adjustments to the Havelock Street sales to make those properties comparable to the subject property.

Mr. Robert Ackles, one of the Appellants, gave evidence on his knowledge of the sales and assessment history of the subject property. According to Mr. Ackles, the previous owner, Mr. Howard Thompson,had purchased the property in 1976 for $14,000.00. In 1978 its assessment of $24,100.00 was reviewed on appeal, pursuant to Section 84 of the Assessment Act, and reduced to $17,400.00. Mr. Ackles stated that he purchased the property from the estate of Mr. Thompson in 1980 for $20,000.00. In 1981 the property was assessed at $29,300.00 which assessment was appealed by Mr. Ackles and subsequently lowered to $20,000.00. In 1984 the property was assessed for $27,500.00, which assessment was appealed by Mr. Ackles and reduced by the Regional Assessment Appeal Court to $25,000.00. It is that assessment which Mr. Ackles appeals, believing that the properties on Eddy Street have not increased in value and that the assessment of his property should have remained at $20,000.00.

Mr. Ackles explained that he had made no repairs to the property since he purchased it. The only improvement he had made to the house was to install a wood stove which is now the principal source of heat because of the poor state of the heating system. The wiring he said was old and out of date. According to Mr. Ackles, the lower end of Eddy Street is a slum and the area he lives in is mixed residential and commercial and in his opinion "not a good neighbourhood".

In cross-examination, Mr. Ackles acknowledged that there were some special circumstances involved in his purchase of the subject property. His sister had at one time been married to Howard Thompson and at his death, Mr. Thompson's three children, who were the heirs to the estate, had the subject property appraised and sold it directly to Mr. Ackles without putting it on the open market. Mr. Ackles agreed that the house was 2 storeys rather than 1½.

Mr. Dale Ackles, brother of the Appellant Robert Ackles, gave evidence on his appraisal filed as Exhibit A-7. Mr. Ackles is a licensed real estate agent with 15 years of appraisal experience, who is currently employed with Purdy Brothers Realty in the Town of Amherst. He was previously employed as an assessor for 8 years at the Cumberland Regional Assessment Office. He is a qualified builder who has built homes for sale for the past 6 years. Mr. Ackles considered that he was an expert appraiser whose work with Purdy Brothers Realty is 80% appraisal, amounting to approximately 150 appraisals a year. In Mr. Ackles' opinion, the sale of the subject property by the estate of Mr. Townsend to his brother, the Appellant, achieved market value since it was a sale by the willing seller to a willing buyer.

Mr. Ackles inspected all of the subject property except the attic of the house. He estimated that the exterior of the house needed $2,500.00 spent on repairs and that the interior needed a complete repainting, new furnace, new wiring, and a new floor in the kitchen and other rooms. Mr. Ackles used the market approach and the cost approach to arrive at an estimate of market value for assessment purposes of the subject property. Mr. Ackles expressed a preference for the market approach which he felt was more reliable than the cost approach which in his opinion was dependent on rates set down in a manual which could be inaccurate.

In calculating the market value of the subject property by the cost approach, Mr. Ackles arrived at a valuation of $21,311.00. To reach this figure, Mr. Ackles first calculated the estimated replacement cost of the building on the property to be $68,743.00, to which he applied a physical depreciation rate of 75% which resulted in a depreciated replacement cost of $17,186.00. To this Mr. Ackles added a land value of $4,125.00 ($75.00 per front foot x 55 feet of frontage of the subject lot).

To estimate the market value of the subject property by the market approach, Mr. Ackles chose the data from the sales of three properties in the Town of Amherst which he regarded as the best possible comparable sales in Amherst over the previous 3 years.

Comparable Sale #1 is a property located at Civic Number 27 Prince Arthur Street which Mr. Ackles regarded as the best comparison because of its location, age and quality of structure. Comparable Sale #1 consisting of a 9 room, 1½ bath house on a 4838 square foot lot sold in August, 1984, for $21,000.00.

Comparable Sale #2 is a property located at Civic Number 21 Lawrence Street which Mr. Ackles regarded as an excellent comparison physically, although the sale took place two years previously.

Comparable Sale #2 consisting of an 8 room, 1½ bath house on a 9375 square foot lot sold in May, 1982 for $20,000.00.

Comparable Sale #3 is a 2 family property located at Civic Number 47 Hickman Street which Mr. Ackles regarded as similar to the subject property before its conversion to a single family home by the Appellants, although a poorer property. Comparable Sale #3, consisting of a 9 room, 2 bath house on a 5,5000 square foot lot sold in August, 1983 for $12,000.00.

In an addendum to his report, Mr. Ackles considered the sale of a fourth property located at Civic Number 6 Harding Avenue which he considered only a fair comparison to the subject because it is in a better location and is a better house. It sold in June, 1984, for $26,000.00.

After adjustment to these comparables for differences in time, location, lot size and condition, the resulting adjusted sale price for the 4 comparables ranged from $14,000.00 to $21,500.00. Considering comparables #1 and #2 to be the best comparisons, Mr. Ackles concluded that the indicated market value of the subject property was $19,000.00. Mr. Ackles stated that in his opinion the poor location of the subject property diminished its value considerably. According to him, Eddy Street carries very heavy traffic - he ranked it second or third in the town in this respect. As well, he referred to the commercial encroachment near the subject property, citing a used car lot up the street and the old curling rink two properties to the north which is now used as a storage facility.

In cross-examination, Mr. Ackles agreed that his opinion of market value of the subject property was as of August 29, 1984, and had not been adjusted to January 1, 1983. Mr. Ackles also stated that in estimating value by the cost approach, he used Boechkh's Manual but not their local modifier - he made up his own local modifier from information obtained from local contractors.

Steven Cameron, an assessor with the Cumberland Assessment Region, prepared a valuation report for this assessment appeal which was filed as Exhibit A-5. Mr. Cameron was qualified as an expert capable of opinion evidence on assessment as a result of his training and 7 years of experience with all types of assessment.

Mr. Cameron stated that he had inspected the exterior of the subject property on June 22, 1984, and the interior on June 25, 1984, and had measured both the exterior and interior. The property is in an area zoned C-1 Central Business District Commercial Zone.

Of the three approaches to value used by appraisers, Mr. Cameron used the cost approach and the direct sales comparison approach (market value approach) to estimate the value of the subject property for assessment purposes. He did not use the income approach because he considered it inappropriate for the subject (single family residential) property.

To estimate land value, Mr. Cameron used the sales prices of three lots of land in Amherst which were sold at various dates ranging from May 1980 to December 1982. After adjusting for time and for differences in lot size, Mr. Cameron arrived at an adjusted front foot value of $85.00 per front foot. He applied this figure to the subject property, reducing the total for a variation from the standard lot size, and arrived at an estimate of total land value of $4,200.00 ($85.00 x 55' x -10% for size = $4,200.00).

To estimate the value of the subject property by the cost approach Mr. Cameron first calculated the reproduction cost of the house to be $54,986.00. From that, he deducted $3,528.00 to allow for physical deterioration curable, deriving this amount from reproduction costs in the manual. Physical deterioration incurable the assessor calculated to be $22,053.00 based on a ratio of the effective age of the structure of 30 years to the economic life expectancy of the building if new of 70 years ($54,986.00 - $3,528.00 x $\frac{30}{70}$ = $22,053.00).

Total physical deterioration Mr. Cameron calculated to be $25,953.00 ($22,053.00 + $3,900.00 = $25,953.00). In this calculation the assessor used the amount of $3,900.00 for curable physical deterioration which he derived from local contractors' estimates, rather then the $3,528.00 derived from reproduction costs in the manual that he had used previously. This discrepancy is noted but not considered by the Board to be of significance in the assessor's final estimate of value which is based primarily on the market approach.

Mr. Cameron believed that some functional obsolescence in the subject property could be cured by a new heating system and the modernization of the electrical wiring which he estimated would cost $2,845.00 and $2,035.00 respectively, for a total of $4,880.00. Incurable functional obsolescence related to excess construction costs in the foundation walls he estimated to be $726.00. Total functional obsolescence he calculated to be $5,606.00 ($4,880.00 + $726.00 = $5,606.00).

In Mr. Cameron's opinion, after analyzing 5 or 6 recent sales in the neighbourhood, the value of the subject property should be reduced by 10% for functional obsolescence caused by "inharmonious locational factors". After application of the total accrued depreciation of $33,901.00 to the reproduction cost of the building ($54,986.00) the assessor concluded that the total property value indicated by the cost approach was $25,285.00, which he rounded to $25,300.00.

To estimate the market value of the subject property by the market data or direct sales comparison approach, Mr. Cameron compiled data on four properties in the town which he considered to be reasonably comparable. The data on each of the comparable properties was adjusted to compensate for differences from the subject property and the sales price of each was adjusted for these differences and for time of sale.

Comparable Sale No. 1 was a property at Civic Number 2 North Adelaide Street. It is a larger house than the subject on a larger lot, with a paved driveway, fireplace and a better heating system. The interior was in better condition. Comparable No. 1 sold in May, 1982, for $37,000.00.

Comparable Sale No. 2 was a property at Civic Number 21 Clarence Street. The lot size is larger than the subject property but the house is almost the same size. It has a better heating system and a garage and is in better condition. It is located adjacent to a park. Comparable No. 2 sold in June, 1982, for $33,000.00.

Comparable Sale No. 3 was a property at Civic Number 6 North Adelaide Street. The house is similar in size to the subject property but the lot is larger. It has a better heating system, a fireplace, a paved driveway and garage. It has only one bathroom. Comparable No. 3 sold in July, 1981, for $32,000.00.

Comparable Sale No. 4 was a property at Civic Number 4

Arlington Avenue. It is a smaller house than the subject on a smaller lot, with a better heating system. The house has only one bathroom but is in better condition. Comparable No. 4 sold in December, 1981, for $22,500.00.

Following the adjustments to each of these comparables, the adjusted sales prices were as follows:

Comparable Sale No. 1	- $26,417.00
Comparable Sale No. 2	- $25,072.00
Comparable Sale No. 3	- $25,614.00
Comparable Sale No. 4	- $24,904.00

Mr. Cameron concluded that the indicated value of the subject property by the market approach was $25,000.00.

Of the three methods used to estimate the market value of property - the cost approach, the direct sales comparison (market) approach and the income approach, Mr. Cameron considered the income approach inappropriate, and preferred the direct sales comparison approach as the most reliable indication of value. Mr. Cameron considered the difficulty of estimating depreciation in an 80 year old structure to be a significant weakness in the use of the cost approach for the subject property. The assessor's estimate of value by the cost approach is $25,300.00; his estimate of value by the direct sales comparison approach is $25,000.00. Mr. Cameron felt that the cost approach estimate supported his estimate of value by the direct sales comparison approach and so chose as his final estimate of value for the subject property, as of January 1, 1983, the amount of $25,000.00.

In cross-examination, Mr. Cameron stated that he could not verify whether properties on streets such as North Eddy Street had experienced the 5% increase in market value which was claimed to be the average annual increase in value of properties in the Town of Amherst. He did not know the ratio of market price to assessed value in the town since the regional assessment office does not keep those statistics.

Counsel for the Appellants called Mr. Dale Ackles to give rebuttal evidence on the property sales considered to be comparable by the assessor.

Mr. Ackles considered that all of the assessor's first 3 comparable sales were in neighbourhoods much better than the subject property and that only comparable number 4 was a good comparison in that respect. All 4 comparables were superior in exterior condition he felt. Mr. Ackles believed that location, exterior condition and heating systems were the most serious differences between the assessor's comparables and the subject property and he believed that further adjustments should have been made to adjust for these differences. Mr. Ackles stated that any increase in property values was not consistent throughout the town and that the lack of repairs to the subject property in the past 5 years would completely offset any general increase in property values.

The Board has considered the evidence adduced at the hearing and the oral argument by Counsel and concludes that the Appellants have not discharged the onus on them to prove that the value of the subject property for assessment purposes should not be $25,000.00 as determined by the Regional Assessment Appeal Court and the assessor. The Board would have difficulty accepting the opinion of Mr. Angus, an appraiser with considerable real estate experience, and Mr. Dale Ackles, an appraiser with both assessment and real estate experience, that the market value of the subject property should be either $19,040.00 or $19,000.00, respectively, when the Appellants purchased it privately in 1980, after it had been appraised, for $20,000.00. The Board accepts the evidence of the assessor as credible both in method and in application.

The appeal of Robert Ackles and Marlene Ackles from the decision of the Regional Assessment Appeal Court on the assessment of their property at 28 Eddy Street, Amherst, Nova scotia, is dismissed without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 4th day of September, A.D., 1985.

EM Lawrence

ELIZABETH LAWRENCE,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Director of Assessment v. Nabisco Brands Canada Ltd. and Lowney, Inc.

ASSESSMENT--COMMERCIAL, BUSINESS OCCUPANCY, AND MANUFACTURING AND PROCESSING EQUIPMENT--MARKET VALUE--COST APPROACH--ALLOCATION OF COST BETWEEN BUILDING AND MANUFACTURING AND PROCESSING EQUIPMENT--PURPOSE OR FUNCTION TEST--ASSESSMENT ACT, SS.1(a)(i),(v),(vi), 7, 14, 38, 101

This is an appeal by the Director of Assessment from a decision of the Dartmouth Regional Assessment Appeal Court which reduced the 1983 assessments for the Moir's Chocolate Factory from $7,310,500.00 to $4,530,000.00 in respect of the commercial assessment for land and buildings and $3,655,300.00 to $2,265,000.00 in respect of business occupancy and increased the 1983 assessment in respect of manufacturing and processing equipment from $1,534,500.00 to $2,141,000.00. Nabisco leases the land, 316,027 sq. ft., from a provincial crown corporation, Industrial Estates Limited. Nabisco owns Lowney, Inc., which in turn operates a chocolate manufacturing plant in a 116,121 sq. ft. steel frame, metal clad building located on the subject land. The building was specifically designed for use as a plant to manufacture chocolates and contained machinery and equipment that had been moved on site from an old plant Nabisco had in Halifax.

HELD: The Board determines the assessments to be $4,577,900.00 for land and buildings, $2,143,000.00 for manufacturing and processing equipment and $2,288,950.00 for business occupancy. The appeal is dismissed. The Respondent is entitled to its costs taxed on a party and party basis.

The Board is required to inquire into the matter de novo. The disagreement between the parties over the proper assessment relates to what elements are properly included in the assessment of the processing machinery and equipment. The major elements in issue fall into two general categories: 1. pipes, wires and conduits used to bring electricity, cold water, hot water, steam and compressed air to the plant and to a cooling system on the roof; 2. equipment providing for a controlled environment in areas of the plant. The Board accepts the evidence of the assessor as to land value. This includes the value of pavement and a chain link fence and is very close to the Respondent's figure. All parties are in agreement that the cost approach is the appropriate method to arrive at market value. Both the assessor and the Respondent's expert agreed that the subject building is a special purpose one specifically designed as a confectionary manufacturing plant; they were far from agreement as to how known costs should be allocated between the building and process machinery and equipment. The legislature intended in the Assessment Act to introduce a "purpose" test to assist an assessor in allocating the assessable property between buildings under s.1(a)(v) of that Act and machinery and equipment that form an integral part of an operational unit designed for or used in processing or manufacturing under s.1(a)(vi). The degree of annexation of piping and wiring etc. to the building and the effect its removal would have on market value is not the proper approach. Mobility is a factor, though, which should be taken into consideration in allocating costs of fixed equipment whether or not mobility is described as a test. Those items of fixed equipment so attached, integrated or annexed to the building that they form part of the building should be classified as part of the building. The remainder of the fixed equipment should be classified based on its mobility as process machinery, equipment, etc. The Respondent's expert allocated costs of various items of property to the building or to process machinery and equipment according to the property's function or purpose, and this is the correct approach. A practice followed by the assessor in depreciating original costs of manufacturing and processing equipment at 50% does not comply with s.38 of the Assessment Act, which requires all property to be assessed at its market value. None of the fourteen grounds of appeal stated by the Appellant are valid and the appeal is therefore dismissed.

NOTE An Application to the Appeal Division of the Supreme Court of Nova Scotia by the Director of Assessment for leave to appeal was granted. The appeal will be heard on February 13, 1986.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by the Director of Assessment from a decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region dated May 16, 1984, respecting the 1983 commercial assessment and business occupancy assessment of the Moirs Chocolate factory located at 375 Pleasant Street, Dartmouth, Nova Scotia, and the 1983 assessment of the manufacturing machinery and equipment used in the factory.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: MARIAN F. TYSON, LL.B., for the Appellant, the Director of Assessment;

SUZANNE M. HOOD, LL.B., for the Respondent the City of Dartmouth;

DAVID MILLER, LL.B., for the Respondents,
Nabisco Brands Canada Ltd.,
Nabisco Brands Canada Ltee.
(Standard Brands Ltd.) and
Lowney Inc.

DECISION

This is an appeal by the Director of Assessment from the decision of the Regional Assessment Appeal Court, Dartmouth Region, dated May 16, 1984, whereby that Court determined the 1983 assessments of property known as Moir's Chocolate factory situate at Civic No. 375 Pleasant Street, Dartmouth, Nova Scotia, as follows:

Commercial (land and buildings)	$4,530,000.00
Business occupancy	2,265,000.00
Manufacturing & processing equipment	2,141,000.00
	$8,936,000.00

The original assessments under appeal to the Regional Assessment Appeal Court were as follows:

Commercial	$7,310,500.00
Business occupancy	3,655,300.00
Manufacturing & processing equipment	1,534,500.00
	$12,500,300.00

The Appellant's Notice of Appeal is dated June 15, 1984, and was filed on June 15, 1984, and is marked as Exhibit N-1. The following are the grounds of appeal set out in the Notice of Appeal:

> "1. THAT the value set by the Regional Assessment Appeal Court is below the market value of the subject property;
>
> 2. THAT the Regional Assessment Appeal Court erred in reducing the land and building assessment;
>
> 3. THAT the Regional Assessment Appeal Court erred in increasing the processing and manufacturing equipment assessment;
>
> 4. THAT the Regional Assessment Appeal Court erred in reducing the business occupancy assessment;
>
> 5. THAT the Regional Assessment Appeal Court erred in accepting the evidence of Christopher Tolley;
>
> 6. THAT the Regional Assessment Appeal Court erred in not accepting the evidence of Tom Mills, assessor;
>
> 7. THAT the Regional Assessment Appeal Court erred in including certain property under Section 1(a)(vi) instead of under Section 1(a)(v) of the Assessment Act;
>
> 8. THAT the Regional Assessment Appeal Court erred in its interpretation of the case law relating to what property is properly

> assessable under Section 1(a)(v) and what property is properly assessable under Section 1(a)(vi) of the Assessment Act and in its interpretation of the tests for this determination as set out by the Supreme Court of Nova Scotia;
>
> 9. THAT the Regional Assessment Appeal Court erred in finding that a percentage of the total mechanical and total electrical costs should be attributed to processing and manufacturing equipment under Section 1(a)(vi) of the Act;
>
> 10. THAT the Regional Assessment Appeal Court erred in finding that certain property provides service to equipment rather than to the building;
>
> 11. THAT the Regional Assessment Appeal Court erred in rejecting the mobility test determined by the Supreme Court of Nova Scotia;
>
> 12. THAT the Regional Assessment Appeal Court erred in not following previous case law of superior courts and in purporting to overrule the Supreme Court of Nova Scotia in its decision;
>
> 13. THAT the Regional Assessment Appeal Court was wrong in its intepretation of Section 1 of the Assessment Act and wrong in determining that the Nova Scotia legislature had intended to introduce a new test as to what property should be included in Section 1(a)(vi) of the Act;
>
> 14. Such other grounds that may appear from the evidence."

The Appellant's Notice of Appeal in addition to listing the above-mentioned grounds of appeal requests that:

> "The Nova Scotia Municipal Board review the matter de novo and fix the assessment of the subject property as follows:
>
> | | |
> |---|---|
> | Land and buildings | $6,120,000.00 |
> | Business occupancy | 3,060,000.00 |
> | Processing and manufacturing equipment | 1,550,800.00" |

The appeal was heard with the consent of the parties at Halifax on December 11th and 19th, 1984. Counsel for the Respondents, Lowney Inc. and Nabisco Brands Canada Ltd. filed a pre-hearing memorandum with the Board on December 7, 1984. Post-hearing submissions were filed with the Board by Counsel on behalf of the Director, the City of Dartmouth and Lowney's. The final post-hearing submission filed was a rebuttal filed on February 1, 1985, by Counsel for the Director to the memorandum filed by Lowney's.

The Respondent Nabisco Brands Canada Limited (hereinafter called Nabisco) is the lessee of the subject property and owns Lowney Inc. which in turn operates a chocolate manufacturing plant in the City of Dartmouth on a parcel of land containing 316,027 square feet known as Civic No. 375 Pleasant Street owned by Industrial Estates Limited, a provincial crown corportion. The building in which the plant is located contains 116,121 square feet of floor space and was constructed by the Austin Company in 1975 under a building contract. The building has a steel frame with metal clad walls and was specifically designed for use as a plant to manufacture chocolates. Prior to 1975 the Respondent Nabisco manufactured chocolates in a plant located in the City of Halifax.

A great deal of the machinery and equipment used in the subject plant had previously been in use in the Halifax plant and had been removed from the old plant to the subject plant and installed under a contract with Black and MacDonald Limited.

At the commencement of the hearing counsel for all parties were in agreement that the appeal was properly before the Board and the Board had jurisdiction to hear the appeal on the merits. The Board is satisfied that the Appellant has properly carried out all the procedural requirements under the Assessment Act, R.S.N.S., 1967, c. 14.

The issue for the Board is the determination of the proper assessment of the land and buildings, the machinery and equipment and the business occupancy assessment for the year 1983.

The disagreement among the parties relates to what elements are properly included in the assessment of the land and building and what elements are properly included in the assessment of the processing machinery and equipment.

The major elements in terms of value which are in issue may be broken down into two general categories, namely: (1) pipes, wires and conduits used to bring electricity, cold water, hot water, steam and compressed air to various production machinery and equipment in the plant and a cooling system located on the roof of the building which cools the air in the chocolate enrobing tunnels and (2) equipment providing for a controlled environment in certain areas of the plant necessary in the manufacturing of the chocolate product.

The allocation of a number of other costs to either building or manufacturing or processing equipment is also in issue.

The Assessment Act in Section 1(a) provides a list of "assessable property" which includes inter alia "(i) land and land covered by water"; "(v) buildings and structures erected or placed upon, in, over, under or affixed to land" and "(vi) machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings, that form an integral part of an operational unit designed for or used in processing or manufacturing except that where different lines of production equipment are used in a food processing operation for processing perishable crops at different times in the year, then only the machinery, equipment, appliances, storage and working tanks, and other things used in the line or lines that are in use for the greatest part of the production".

The Board is required to "inquire into the matter de novo..." under the provisions of Section 101(1) of the Assessment Act.

Evidence was given on behalf of the Director by the assessor Thomas Mills and Donald F. Horne, the Regional Director of Assessment and also by Michael Ogden, the Plant Engineer. Christopher Tolley, a Quantity Surveyor and appraiser and Colin H. Gamble the Plant Manager gave evidence on behalf of Nabisco.

No evidence was called by Counsel for the City of Dartmouth who attended the hearing as watching counsel only.

Appraisal reports were prepared by Mr. Mills (Exhibits N-6 and N-7) and by Mr. Tolley (Exhibit N-8). A pre-hearing memorandum was filed by Counsel for Lowney Inc. Post-hearing submissions were filed with the Board on behalf of the Director, the City of Dartmouth and Lowney Inc.

Thomas Mills a qualified assessor with ten years experience in the assessment field and presently Assistant Regional Director of the Dartmouth Assessment Region gave evidence on behalf of the Director in support of the Director's position that proper valuations for assessment purposes for the 1983 assessment year should be as follows:

1.	Land and building	$6,135,000.00
2.	Business occupancy	3,067,500.00
3.	Manufacturing and processing equipment	1,557,800.00

These are the suggested assessment figures set forth in the appraisal report prepared by Mr. Mills and filed with the Board as Exhibit N-6.

Of the $6,135,000.00 estimated by Mr. Mills to be the proper assessment for the 1983 assessment year for land and buildings, he determined that the land value only amounted to $647,900.00 made up of three separate items namely:

1.	Raw land value	$ 600,000.00
2.	Pavement and sidewalk	43,500.00
3.	Chain link fence	4,400.00
		$ 647,900.00

Mr. Mills arrived at his land value by using the actual cost figures given to him by Nabisco with respect to the pavement and the chain link fence. He then adjusted these figures for time and depreciation. He obtained his raw land valuation of $600,000.00 by multiplying the land area of 316,027 square feet by $2.00 after having examined two sales of smaller parcels of land located in the vicinity of the subject property. These two sales resulted in a square foot valuation of one parcel of land in the amount of $2.53 and $2.54 for the other parcel. After multiplying 316,027 (the number of square feet in the subject lot) by $2.00 he obtained the sum of $632,054.00. From this figure he deducted the sum of $32,000.00 which was his estimate of the reduction in value to the subject lot caused by the presence of a small stream which runs across the rear of the lot. Because the subject lot is a larger parcel of land than the two lots used for comparison purposes he adjusted the square foot value to $2.00 on the basis that the subject lot by being a much larger parcel of land would have a square foot value lower than the comparables.

The following are extracts from Mr. Mills appraisal report showing how he calculated the raw land value of the subject property in the sum of $600,000.00.

SITE VALUATION - PAGE 12 OF APPRAISAL REPORT

"TOTAL LAND AREA:	316,027 sq. ft.
RATE PER SQ. FT.:	$2.00
VALUE:	$632,054.00
ALLOWANCE FOR STREAM:	$ 32,000.00
LAND VALUE 01/80:	$600,054.00
ROUNDED TO:	$600,000.00"

Mr. Mills's calculation for the value of pavement and sidewalk is set forth on page 13 of his appraisal report and it reads as follows:

"ACTUAL COST 1975: $ 42,780.00
TIME ADJ. JANUARY 1980: x 1.27
COST NEW 1980: $ 54,330.00
DEPRECIATION: (5/25) x 80%
DEPRECIATED COST: $43,464.00
ROUNDED TO: $43,500.00"

Mr. Mills's calculation for the value of the chain link fence is set forth on page 14 of his appraisal report and it reads as follows:

"COST NEW MARCH 1981: $ 4,813.00
DEPRECIATION: $\frac{18.25}{20}$ x .913
DEPRECIATED COST: $ 4,394.00
ROUNDED TO: $ 4,400.00

*No time adjustment for fencing between January 1, 1980 and January 1, 1983 was found to be warranted when actual costs were researched with local contractors."

In summary, Mr. Mills indicated a land value of $647,900.00 made up of the three items previously mentioned.

The Board accepts the evidence of Mr. Mills as to land value and determines this value to be the sum of $647,900.00. The Board notes that Mr. Tolley in his appraisal report (Exhibit N-8) uses a land value of $600,000.00 which was the assessor's valuation for the raw land value. It is the Board's opinion that the value of the pavement ($43,500.00) and the value of the chain link fence ($4,400.00) should be added to the raw land value to obtain the total land value.

The determination of the proper assessment for the building and for the manufacturing and processing equipment is a much more difficult task. Mr. Mills, the assessor, arrived at a value for the subject buildings in the amount of $5,486,700.00 and $1,557,800.00 for the manufacturing and processing equipment, whereas Mr. Tolley, the appraiser for Lowney Inc., determined the buildings' value to be $3,930,000.00 and the manufacturing and processing equipment to be $2,141,000.00.

The subject building was constructed under an agreement between Standard Brands Limited as owner and The Austin Company Limited dated June 27, 1973 for the design and construction of a confectionery manufacturing plant approximately 110,000 square feet in size. This contract hereinafter referred to as the Austin contract was referred to in the evidence but a copy of this contract was not available to the Board until March 8, 1985, when the Board received a copy from counsel for Standard Brands Ltd. This contract was filed at the request of the Board and with the consent of counsel for the other parties.

Another contract was given to Black & MacDonald Ltd. to move equipment from the old Moir's plant in Halifax to the subject plant and install this equipment along with new equipment. Extensive references were made to this contract during the hearing of the appeal. The Board requested that a copy of this contract be filed. Counsel for Standard Brands Ltd.

informed the Board by letter dated March 6, 1985, that his clients "have been unable to locate in their records a copy of the Black and MacDonald contract" and that they were unable to obtain a copy from Black and MacDonald either "having been destroyed by Black and MacDonald in the usual course of their business".

Mr. Mills gave evidence that in determining the value of the building and equipment he used actual costs. His first construction costs were obtained from Industrial Estates Ltd. who provided costs to the City of Dartmouth after the building was erected. These costs are shown in Schedule 4 of the Mills' report totalling $4,529,899.00. Mr. Mills stated that originally these costs were the only costs available and were the basis of the assessments prior to 1983. Subsequently in 1983 the assessor was provided additional information concerning actual costs by counsel for Lowney's, this information is set forth as schedule 5 to the Mills' report and consists of six sheets of actual construction costs relating to the Austin contract. Mr. Mills explained that Schedule 5 was a "progress claim" which sets out "the costs which were first estimated for the project, the actual costs and the costs to date... This particular claim appears to be the final claim". It is dated October 31, 1975.

When asked what did he do with Schedule 5, Mr. Mills stated that he "proceeded to examine the various categories of the construction costs to eliminate costs which would not be typical costs of building construction and there were some items I then eliminated on that basis." Mr. Mills then went over all of the items shown on Schedule 5 and pointed out what items he eliminated. He stated that the items he excluded had a line drawn through them and the ones included had a tick mark opposite them. He indicated that he had excluded all cost items relating to winter conditions including temporary heating and fuel and winter protection items, snow removal, cleanup and heaters.

On page 2 of Schedule 5 there is shown an item marked Engineering 5A in the amount of $20,014.00 which Mr. Mills understood represented the cost of an engineering study by the contractor "in relation to the equipment which was to be moved from the old plant and placed in the new plant." He included this item as part of the building cost because the "subject property was specifically designed special purpose property and it must be designed in order to accommodate the equipment which was to be placed there so it seemed reasonable that there must be some studies done in order to properly build the special purpose property".

Mr. Mills when asked if he had personally checked the individual cost figures shown in Schedule 5 responded that he had not. He did, however, compare his overall cost figures on a cost per square foot basis with other processing food plants in the City of Dartmouth.

Mr. Mills stated that he had excluded from the total costs shown in Schedule 5 of his appraisal report the cost of eight items shown on page 2 of Schedule 5 under the heading of "Site and Yard Work". The excluded items are "strip topsoil - $6,453.00; asphalt paving - $42,614.00; exterior sidewalks - $166.00; cut and fill site to grade - $28,732.00; height standard foundations - $960.00; culvert pipes - $324.00; transformer foundations - $210.00; and spread top soil - $288.00. These items totalling $79,747.00 and some additional items were excluded by Mr. Mills because he did not consider them to be normal building costs. He considered these items to be "site work as opposed to building costs".

On page 3 of Schedule 5 of the Mills Report is a cost item shown as "Pilings" in the amount of $48,806.00. This cost and the cost of the first four items under the heading of "Concrete" totalling $21,499.00 were removed from the costs shown in Schedule 5 by Mr. Mills on the basis that these costs related to the subsoil conditions of a swampy area of the land and "were part of the costs of correcting the problem of the lot...". Also excluded by Mr. Mills under the heading of "concrete" was the sum of $1,474.00 for the cost of "winter heat and tests" on the basis that this was a cost relating to winter conditions.

On page 6 of Schedule 5 the first cost item is designated "Electrical" in the amount of $401,386.00 which is the second largest cost item shown in the schedule. Mr. Mills included this cost in the costs allocated to the building "in the belief that this was a cost of the electricity for a plant of this nature in order for it to be able to house the machinery which was to follow." Mr. Mills explained that when he spoke of the cost of electricity he meant the cost of the wiring "through the plant to the panel boxes on the walls." When asked by the Board to explain precisely what the electricity cost represented, Mr. Mills stated that "it was my belief that what I was given was the cost of installing the electricity at the entrance of the building and then distributing that electricity to different areas of the building". It was Mr. Mills understanding that the $401,000.00 represented the cost of the wiring to service the building.

Mr. Mills in reply to a question as to whether there was any "special wiring or lighting that would be different from your typical warehouse..." stated that "there are areas in the plant requiring explosion proof fixtures - for instance in wiring these would be the starch handling areas where they have specialized explosion proof fixtures...". He stated that his costing manuals indicated that the cost of explosion proof wiring is 300 - 400% more than typical wiring." Mr. Mills stated that the explosion proof fixtures are located in the starch handling areas of the plant which "would probably be about 20% or 15 - 20% of the total floor area possibly".

Mr. Mills when asked if the $401,386.00 cost for electrical installation was reasonable, stated he did calculate a cost from Boeckh's Valuation Manual and came up with a figure of $356,000.00 "for a building of this size without allowance for the explosion proof nature and without adjusting it for time from 1971 and this is a 1975 cost". Mr. Mills stated however that he did not rely on the cost figures obtained from Boeckh's Manual "because of the nature of the special purpose of this property and the size of the property. Coming from a square foot rate I didn't really put weight to that". Mr. Mills stated that the cost figures obtained from the costing manual included process wiring costs. It was the evidence of Mr. Mills that there was no additional information available to him in breaking down the cost items shown in Schedule 5.

The largest cost item shown on page 6 of Schedule 5 relates to H.V.A.C. in the amount of $772,008.00. This represents the cost of the heating, ventilation and air conditioning system in the building and was included in the overall cost of the building by Mr. Mills. He explained that "its purpose is to provide climate controlled conditions within various areas of the building...".

Mr. Mills included as part of the building costs the cost of "Process Piping" shown on page 6 of Schedule 5 in the amount of $127,860.00. This is an item which would appear to be in the category of manufacturing or processing equipment. Mr. Mills included the cost of this item in the building costs because he felt that this piping would of necessity have to be installed at the time of the construction of the building because it would pass through floors and walls and "would therefore be a part of the building". Mr. Mills admitted that he had difficulty trying to differentiate between process piping and water piping. Mr. Mills stated that "I was never very certain about whether it had to do with steam piping or product piping. My understanding was that the item would have to be installed at the time that the building was built because of the built-in nature of the encasement within the building wouldn't allow for that piping to be added at a later date. For that reason I included the item".

Mr. Mills arrived at a figure of $5,409,021.00 as the depreciated cost of the building which he rounded to $5,409.000.00. This figure was obtained by taking the edited cost from Schedule 5 of $3,907,800.00 and adding to this figure certain additional costs attributed to the building which Mr. Mills obtained from schedule 4 of his report.

The following taken from page 23 of the Mills appraisal report is a summary of the figures which make up the $5,409,021.00 depreciated building cost calculated by Mr. Mills:

"A) **MAIN BUILDING**

Edited cost to October 1975:	$3,907,800.00
Additional Cost I.E.L. letter:	
Standard Brands Ltd.	16,058.00
Architects Fees	50,634.00
Permits and Surveys	1,216.00
Total 1975 Building Cost:	$3,975,708.00
Time Adjustment 01/80 $\left(\frac{1.83}{1.28}\right) =$	x 1.430
Cost New January 1980:	$5,685,262.00
Nut Roast Room - 06/79:	3,700.00
In Rack Sprinkler & Fire Alarm 03/78:	4,745.00
Total Cost New January 1980:	$5,693,707.00
Depreciation - 5%	x 95%
Depreciated Cost:	$5,409,021.00
ROUNDED:	$5,409,000.00"

Mr. Mills in his building cost calculations factored forward the 1975 building costs to 1980 and added two additional costs relating to the "Nut Roast Room" and the "In Rack Sprinkler & Fire Alarm". These two additional costs were obtained according to Mr. Mills "from a computer print-out from I.E.L. listing their machinery, equipment and other assets". This computer print-out was filed as Exhibit N-11. The print-out was provided to Mr. Mills by the accounting department at Lowney's. Mr. Mills testified that it was "through this list that we came to our manufacturing and processing total".

Mr. Mills stated that the Nut Roast Room and In Rack Sprinkler & Fire Alarm items shown on page 23 of his report were obtained from Exhibit N-11 and were included in his building costs but had not been included in his figures submitted to the Regional Court. He stated they were "overlooked at the Regional Court".

Mr. Mills gave the following reasons for including the Nut Roast Room in the building costs, viz:

> "Well, the nut roast room is a concrete block room built by Lowney's to house their nut roast equipment and it is a room within the building and in my mind a building cost. The problem is that it was listed within this list as a leasehold improvement because in actual fact the property is owned by I.E.L. and leased by Lowney's and the lease is based upon the construction costs as outlined in the Schedule number 4 so that any additions to the building have to be listed by Lowneys as a leasehold improvement as opposed to buildings, a fixed asset."

After arriving at the sum of $5,693,707.00 as the total cost new of the building as of January 1, 1980, Mr. Mills allowed 5% depreciation on the building. This resulted in a calculation of $5,409,000.00 as the rounded depreciated cost of the building.

In his calculations of the total building costs Mr. Mills added the adjusted costs of three additions to the building after the original building had been constructed.

These additions are shown on page 23 of the Mills report as follows:

"B)		
Reefer Trailer: Cost May 1981:	$	10,000.00
Time Adjustment 01/80 ($\frac{2.04}{2.42}$)		x .843
Cost to 01/80		9,263.00
ROUNDED	$	9,300.00
C)		
1979 Machine Room Cost	$	3,000.00
D)		
Starch Conditioning Addition	$	120,000.00
Less set-up cost:		35,500.00
Building cost Fall 1982:		84,500.00
Time Adjustment 01/80 ($\frac{1.92}{2.48}$)		x .774
Cost to January 1980:	$	65,419.00
ROUNDED	$	65,400.00"

Mr. Mills explained that the reefer trailer was used as a fumigation chamber and was attached to the rear of the building and is supported by a concrete pad. Equipment entering the building does so by being first placed in the trailer which is then filled with fumigation gas. The machine room was constructed in 1979 at a cost of $3,000.00. The third addition is the starch conditioning room which is an addition to the building and was constructed in 1982. This cost was adjusted for time to January 1, 1980.

Mr. Mills testified that there had been an attempt to cost the subject building from costing manuals but so many modifications to the models given in the manual were required that this method of costing was abandoned. He also indicated that because there was no comparable market data available he could not apply the market data approach to value.

Mr. Mills at page 24 of his report sets out a cost approach summary as follows:

"Land as Vacant:		$ 600,000.00
Yard Improvements:	Pave:	43,500.00
	Fence:	4,400.00
Main Building:		5,409,000.00
Reefer Trailer:		9,300.00
Machine Room:		3,000.00
Starch Conditioning Room:		65,400.00
TOTAL:		$6,134,600.00
ROUNDED:		$6,135,000.00"

Mr. Mills explained that he arrived at a figure of $3,067,500.00 for business occupancy assessment by taking 50% of his land and building total of $6,135,000.00.

Mr. Mills calculated the value of the manufacturing and processing equipment in the amount of $1,557,800.00. On pages 25 and 26 of his report Mr. Mills states how he obtained this figure. Firstly, he quoted the definition of "assessable property" as set out in Section 1(a)(vi) of the Assessment Act which reads as follows:

> "'ASSESSABLE PROPERTY' means machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings, that form an integral part of an operational unit designed for or used in processing or manufacturing except that where..."

Mr. Mills then states in his report at page 25 that:

> "The subject property is a special purpose food processing facility which houses a sophisticated network of equipment which is assessable under Section 1(a)(vi). The capital cost of this equipment has been provided by the respondent by way of a computer printout titled Property Listing - Lowney Dartmouth Plant."

And also at page 25 he states that the computer listing:

> "includes items of furniture and fixtures, leasehold improvements, manufacturing equipment and mechanical office equipment. After editing this list and adding supplementary items installed subsequent to the computer printout date a total capital cost of $3,115,575.00 for manufacturing equipment was arrived at."

The following is the balance of Mr. Mills report on page 26:

> "The overall cost of $3,115.575.00 can be roughly divided into two groups. The first group is the hard equipment cost and the second the soft or installation costs are $960,581.00 (Addenda Schedule 7) The inclusion of both hard and soft costs provides for an operational unit as set out in Section 1(a)(vi).
>
> The method of valuing equipment within

> the municipality has similarities with the approach of valuing special purpose real estate. The capital costs are used in both instances in that going concern sales information is not available and an income approach is not appropriate.
>
> The calculation of assessed value of manufacturing and processing equipment within the municipality is done by taking one-half of the installed capital cost and entering this on the assessment roll. Using this method the calculation for the assessed value of manufacturing and processing equipment at the subject plant would be:
>
> $$\frac{\$3,115,575.00}{2} = \$1,557,787.00$$
>
> ROUNDED: $1,557,800.00"

In explaining why the assessment valuations given at this hearing and the valuations given in evidence at the hearing before the Regional Court are different, Mr. Mills stated that prior to this appeal "the only cost information we had on the building was from that letter of I.E.L.'s which was the costs upon which the financing of the land and building was based". He stated that Schedule 4 of his report set forth the costs given by I.E.L. It was only in April of 1983 that he had received the cost breakdown contained in Schedule 5 of his report and "that enabled us to better determine the actual costs and that is what produced the change". He pointed out that the actual costs shown in Schedule 4 which he originally used as building costs amount to $4,144,789.00 which is the total of the first five items shown on Schedule 4. He then factored this figure forward to the date of the assessment roll and applied depreciation to arrive at the original assessment for land and building in the amount of $7,310,500.00.

Although Mr. Mills originally assessed the subject land and building for the 1983 assessment year at $7,310,500.00 he recommended the sum of $6,120,000.00 as the proper assessment when he appeared before the Regional Assessment Appeal Court. He has recommended to the Board the amount of $6,135,000.00 as the proper assessment value. The additional amount of $15,000.00 in the recommended assessment value resulted from the fact that Mr. Mills had not included values for the Nut Roast Room and the In Rack Sprinkler System when he gave evidence before the Regional Court. Also he gave different values for pavement and the chain link fence. At the Regional Court hearing Mr. Mills had used .75¢ a square foot for the value of the pavement and then depreciated that value by 20%. At the hearing before the Board he used the actual cost of the pavement and he used a slightly higher value for the chain link fence.

Mr. Mills testified that he had recommended to the Regional Court a valuation of $1,555,800.00 for the manufacturing equipment and had changed his valuation to $1,557,800.00 at this hearing. He accounted for the $2,000.00 difference by having "transposed incorrectly a figure from $36,200.00 to $32,000.00 and that $4,000.00 difference resulted by the application of 50% for the equipment calculation, a $2,000.00 difference in my calculation in the original instance and this".

Mr. Mills testified that he calculated the value for assessment purposes of the manufacturing and processing equipment from the detailed costs contained in a computer print-out listing the assets in the subject plant. This list of assets was filed as Exhibit N-11 and was given to Mr Mills by Lowney's. The first column of N-11 lists the assets and the third column shows the cost of the assets. Mr. Mills eliminated some specific assets listed in Exhibit N-11 including the first four pages of N-11 most of which were items of furniture. Other assets listed in Exhibit N-11 eliminated by Mr. Mills as not being manufacturing and processing equipment included the nut-roast room, the fumigation chamber (reefer trailer), and the fence for the truck compound.

Mr. Mills went over each page of Exhibit N-11 explaining what assets he included as manufacturing and processing equipment and what assets were not included. On page 19 of Exhibit N-11 Mr. Mills eliminated all but three assets. Mr. Mills admitted that he had some difficulty in determining whether the cost of some assets listed in N-11 should be allocated to building or to manufacturing and processing. In some instances where he considered that the cost of some items should be allocated partly to building and partly to manufacturing equipment, he was unable to make the allocation. One asset in this category is the "Temperature Monitoring" asset listed on page 23 of N-11. Mr. Mills allocated the cost of this asset ($5,266.00) to manufacturing equipment although he was of the opinion that it served both the building and the processing or manufacturing function.

On page 24 of Exhibit N-11 Mr. Mills eliminated four items namely machine shop equipment, fuel oil tank meter, ultrasonic sound detector and a sliding door. He said the sliding door at a cost of $810.00 should have been allocated to the building cost. He allocated the cost of the ultrasound detector used to detect steam leaks in the high pressure steam system to repairs and maintenance.

On page 25 of N-11 Mr. Mills deleted the cost of a fork-lift truck and a percussion drill which he said were not manufacturing or processing equipment.

Mr. Mills pointed out that the list of manufacturing equipment ends on page 26 after the fourth listed item and the remainder of N-11 lists office equipment. He deleted the cost of a "Floor Scrubber" shown as the fourth item on page 26 which he determined was not a piece of manufacturing or processing equipment.

After eliminating various items from the computer print-out of assets listed in Exhibit N-11 Mr. Mills arrived at an amount of $2,683,275.00 as the cost of the manufacturing and processing equipment shown on the list. He then explained that he added the sum of $243,155.00 being the value of new equipment not shown in N-11 and he deducted the sum of $32,613.00 representing the value of equipment removed from the plant. The information for these additions and deductions was obtained in a letter (Exhibit N-12) from Lowney's to Mr. Mills in August, 1983. Mr. Mills stated that his cost figures for equipment included installation costs. Finally, he added the sum of $221,758.00 to his equipment costs. He obtained this figure from a list of equipment sent to him by Lowney's entitled "Moir's

Plant - Lowney Inc. Additional Acquisitions Prior to September 1, 1982" and filed as Exhibit N-13. He deleted some items which are shown on N-13 which "didn't relate to manufacturing and processing equipment." The result of these calculations provides a total capital cost of $3,115,575.00 for the manufacturing and processing equipment which when depreciated by 50% results in the sum of $1,557,800.00 (rounded) as Mr. Mills' estimate of the assessed value of the manufacturing and processing equipment.

Mr. Mills although he did not compare any of the individual component building costs of the subject property with other individual component costs of similar properties did compare the square foot building cost of the subject property with the actual square foot costs of other food processing buildings in the City of Dartmouth. Schedule 6 of the Mills Report (Exhibit N-6) lists the names of the companies which own these other buildings. This schedule indicates that the actual square foot cost adjusted to January, 1980, for the Baxters Dairies Limited Building was $60.83; for the Moosehead Breweries Ltd. building was $51.12 and for the Major Vending Ltd. building was $41.85. Mr. Mills' square foot cost new for the subject building adjusted to January, 1980, was $48.96. All of these figures are costs prior to the calculations of depreciation. All of the three comparables are located in the Burnside Industrial Park. When asked by the Board as to what weight or effect should be given to these figures Mr. Mills responded that it shows that his figure for the square foot cost of the subject property "is not wildly irrational...".

Mr. Mills identified the various photos of plant and equipment shown in Exhibit N-7 and explained how he allocated each item to either building costs or processing and machinery costs. Photos numbered 17 and 18 show roof-top mounted equipment. Photo number 17 shows a rooftop self-contained air conditioning unit used to control the environment in a portion of the plant and number 18 shows rooftop mounted condensers which are part of a system to cool the enrobing tunnels and tables in the plant. These two items were assessed by Mr. Mills as part of the building. When asked by Counsel for the Director whether the condensor units should be assessed as building or equipment Mr. Mills responded as follows:

> "I find this one of the real gray areas it's dedicated to specific machines and the only problem is that there is four units here but there is six or eight machines which it is dedicated to. So it is almost like it is a service which is being tapped into. As I say, right now all of the installation costs are under equipment but I think the hard cost of the actual units themselves are included in the building."

Mr. Mills testified that the starch screw conveyor attached to the ceiling by brackets is used to transport starch from the starch conditioning room. A portion of this conveyor is shown in photo number 28 of Exhibit N-7. This component is assessed as processing equipment. Pictures numbered 29 and 30 show two steam boilers, one high and one low pressure, both of which are assessed as part of the building.

On cross-examination Mr. Mills stated that to obtain the assessment value of the manufacturing equipment he took the original capital cost and divided that cost by two. When asked by Counsel for Nabisco why did he follow this method he responded that:

> "It is the method which has been used within the municipality on all of the other manufacturing and processing equipment - it is the method which is used in general throughout the Province."

Mr. Mills agreed that this method of evaluating the equipment was by the application of a formula rather than actually arriving at a value.

On cross-examination Mr. Mills admitted that in arriving at his building costs although he had added in the cost of additions to the original costs and factored these costs ahead to January, 1980, he had not made any deletions to his costs for items which have been moved or are no longer in use. He did however make an "allowance" for the deletions when he determined the rate of depreciation to be 5% rather than the 3% suggested by Boeckh's Manual.

Michael Ogden, the Engineering Manager of the subject plant, looks after the day-to-day running of the plant from an engineering point of view was called by counsel for the Director. He was unable to state what is included in a figure of $319,785.00 for Engineering shown on page 6 of Schedule 5 to the Mills report. He stated that he was not employed by Moirs at the time of the installation of the equipment in the plant. With respect to the amount of $401,386.00 shown on page 6 of Schedule 5 Mr. Ogden was asked if it was his understanding "after having heard Mr. Mills' testimony that this electrical work named in that item was the electrical work for putting in the transformers and bases and the wiring up to and including the main panels at different locations in that plant?" His response was "If this is under the Austin contract I would assume it would be". He was unable to state what was included in the figure of $767,754.00 for "H.V.A.C." shown on page 6 of Schedule 5 also part of the Austin contract.

Mr. Ogden, while he could identify in most instances various pipes in the plant was unable to do the same for the wiring in the plant.

When asked if the piping in the plant could be removed without decreasing the value of the pipes or the structure itself, he stated that the pipes could be removed with very little damage to the structure. He was not certain about the effect on the pipes. He indicated that "in some instances you would have to remove a concrete block, in other instances where they pass - in most cases they are directly above the ceiling and they are just exposed areas, they wouldn't disturb anything - in some cases they go through gyprock, or gyprock partitions between the tops of the partition walls and the roof deck itself - the underside of the roof deck." He indicated some pipes would have to be cut and some could be pulled out. Where the pipes go through floors "there are specific openings provided for those pipes to go through those".

Mr. Ogden stated that most of the wiring in the plant is visible and is in trays or conduits or ducts which are accessible.

He stated that most of the wiring is in the ceiling or is suspended from the ceiling.

Mr. Ogden explained that there are two steam boilers in the plant, one high pressure and one low pressure. The high pressure boiler supplies steam for the processing machines through a high pressure main. He indicated that the high pressure steam boiler and its pipes which deliver the steam to the processing machines could be removed and the building itself would not be affected as a building. He indicated that a small amount of high pressure steam is used to supply heat to one area in the chocolate room but that no portion of the low pressure steam system is used in the production or processing of chocolate.

Evidence on behalf of Nabisco was given by Christopher Tolley. Mr. Tolley is a partner and senior appraiser with A.E.C. Appraisal and Evaluation Consultants Ltd. He is also a registered mortgage broker in the Province of Ontario. He holds a diploma as a quantity surveyor and has been involved in the valuation of buildings and equipment for the past ten years both in Canada and the U.S.A. He has valued food processing plants in Ontario and in a number of other Provinces. About 50% of his time is devoted to valuation for assessment purposes. He prepared an appraisal report respecting the subject property filed as Exhibit N-8.

Mr. Tolley indicated that he had not specifically reviewed the assets in the manufacturing and processing category. He valued the subject building using two approaches, Boeckh's Manual and actual construction costs. He arrived at a value of $4,530,000.00 for land and building of which $3,930,000.00 represents building value.

In Mr. Tolley's opinion "a large proportion of the Austin contract is related to the equipment, machinery and equipment and I discounted the machinery and equipment from the Austin contract and this develops the figure that I have for the building of $3,930,000.". His evidence was that the removal of certain items from Austin and classifying those as machinery and equipment was basically the difference between his valuation figure for the building and Mr. Mills' figure.

Mr. Tolley referred to page 70 of his report (N-8) which has a heading which reads: "Tabulation of Allocation For Machinery and Equipment and Associated Costs". This tabulation lists various items in the Austin contract which he removed and allocated the aggregate amount of $1,172,642.00 to machinery and equipment. Mr. Tolley although making reference to the Austin contract was not actually familiar with the contract. He had the same six pages of cost information as had Mr. Mills relating to the Austin contract. Pages 73 - 78 of the Tolley report are the same as the pages attached to the Mills report as Schedule 5. Mr. Tolley referred to these costs in his report as "Reported Construction Costs".

Mr. Tolley in his summary of construction costs shown on page 71 of his appraisal report took as his base construction costs the sum of $3,975,708.00 which is exactly the same figure used by Mr. Mills in his building cost calculations. This figure represents the "edited" costs from the Austin contract of $3,907,800.00 shown on page 6 of the "Reported Construction Costs" to which were added three items shown on page 23 of the Mills Report for a total 1975 building cost of $3,975,708.00. Mr. Tolley's own calculations produced a figure of $3,977,381.00 which was so close to the Mills figure that he adopted the figure used by Mr. Mills. Mr. Tolley then deducted from the total figure of $3,975,708.00 the value of the process machinery and their associated costs shown in his "Tabulation of Allocation For Machinery and Equipment and Associated Costs" in the amount of $1,172,932.00 which gave him a figure of $2,802,776.00 as the adjusted 1975 construction costs on the building. He then factored this figure forward to 1980 by multiplying by 1.43 to arrive at a 1980 reconstructed cost of the building in the amount of $4,007,969.00. He then applied depreciation at 5% to obtain a figure of $3,807,571.00 as the 1980 depreciated reconstructed cost of the building. He then added the value of three additions to the plant factored forward to 1980 for time. These three additions were the Reefer Trailer (1981) $9,263.00, the machine room (1979) $3,000.00 and the Starch Conditioning building (1978) $65,419.00 for a total of $77,682.00. He then added the land value of $600,000.00, fencing at $4,062.00 and pavement at $37,500.00 for a total 1980 market value for assessment purposes of land and buildings in the amount of $4,526,815.00 which he rounded to $4,530,000.00. These figures are shown on pages 71 and 72 of the Tolley Report (Exhibit N-8).

In his appraisal report (Exhibit N-8) Mr. Tolley states at page 17 that the cost approach to value was used to estimate the market value as of January, 1980. He also states that "in using the cost approach to value, we have been guided by the actual construction costs". He further notes at page 17 that "the reported construction costs include costs that are for or specifically associated with the manufacturing process. These elements of cost have been excluded from our final valuation used to estimate an equitable assessment; however, the discounted amounts are indicated separately".

Mr. Tolley's report states at page 18 that "the subject premises in real estate parlance may be termed 'a special purpose' property, namely, a confectionary manufacturing plant. In illustrating the specialized nature of the manufacturing process, we set forth below a synopsis of the controlled requirements of candy manufacture. It can be seen that many of the mechanical and electrical controls required, are strictly requirements of the manufacturing process."

Mr. Tolley's evidence with respect to allocating costs between building on the one hand and processing and manufacturing equipment on the other hand was that his criteria in this regard was the function served by the component.

Mr. Tolley reviewed his report and explained the manner in which he made allocations of various costs to machinery and equipment.

In determining that 1/3rd of the cost of miscellaneous iron should be allocated to process machinery Mr. Tolley was asked how he arrived at this proportion and replied "it is simply my judgment, my observation".

With respect to plumbing costs, Mr. Tolley allocated 10% of these costs to machinery and equipment. He again used his judgment after viewing the drawings and from his inspection of the plant. On questioning from the Board, Mr. Tolley stated that the 10% allocation for plumbing costs is an estimate and he agreed that some other person could possibly arrive at a different percentage.

Mr. Tolley indicated that he had not independently valued the various component elements to arrive at his cost of machinery and equipment figures.

He estimated that 50% of the electrical costs should be allocated to machinery and equipment and he stated in evidence that "there is wiring that is specifically for building, there is wiring that is specifically for processing and there is wiring that is integrated between the two which performs both before it is split off to the various components".

With respect to heating, ventilation and air-conditioning, Mr. Tolley allocated 75% of the cost to processing equipment.

With respect to process piping in the amount of $127,093.00, Mr. Tolley allocated 100% of this cost to machinery and equipment. With respect to general administration costs, Mr. Tolley allocated 30% of these costs to machinery and equipment and he referred to general administration costs as "global" in their nature. He also allocated 30% of architects fees, and permits and surveys to machinery and equipment.

After applying his various percentages to cost items from the Austin contract he arrived at the sum of $1,172,932.00 which represents the total sum which he felt should be deducted from the Austin contract because he felt these items represented costs which should properly be allocated to machinery and equipment. The details of these allocations making up the $1,172,932.00 are shown on page 70 of his appraisal report. Mr. Tolley later, on cross-examination, agreed that this figure should be $1,170,731.00 after he admitted that his 30% allocation of miscellaneous iron costs was in error and should have been calculated at 33 1/3%. This adjustment resulted in an additional sum of $2,799.00 for miscellaneous iron costs and a corresponding increase in his total cost allocated to machinery and equipment from the Austin contract. He also agreed that the item "Temporary Construction" (30% x $27,881.00) $8,364.00 should read (30% x $12,180.00) $3,654.00.

Mr. Tolley's appraisal report is directed to the estimation of the market value of the land and buildings located at 375 Pleasant Street, Dartmouth as of January 1, 1980. His estimate as has already been mentioned is $600,000.00 for land and $3,930,000.00 for buildings for a total of $4,530,000.00 for land and buildings. His appraisal report respecting machinery and equipment expresses his opinion as to certain costs incured by Standard Brands under the Austin contract which he considers are not costs related to the buildings and which he "allocated" to the machinery and equipment costs.

Evidence was given by Colin H. Gamble, the Plant Manager of the subject plant, a position he has held for 7½ years. He has an accounting background and is responsible for the entire operation of the plant in question and is fully familiar with the plant.

Mr. Gamble was asked to explain the significance of the item "hoods exhaust" referred to on page 29 of Exhibit N-15 which is the "Outline Specification" for the subject plant prepared by the Austin Company. This item appears as part of a section in N-15 entitled "Mechanical Ventilating" which states that "Process ventilation will be provided for year-round operation for heat removal, hoods, exhaust, fumes exhaust, etc., as shown on attached table on page 30". Mr. Gamble stated that "upstairs on the cooking floor we have a raised platform, a separate mezzanine area where there are some cookers up there. Those cookers have hoods on top of them and exhausted to the atmosphere. My understanding is that the Austin Company provided the hole through the roof itself and the fan equipment for the actual physical hooking up of these exhaust hoods to that vent system." He also stated that the exhaust hoods are connected to the hole in the roof by a series of ducts installed under the Black & MacDonald contract.

Mr. Gamble explained that the 50-ton Trance Water Chiller shown on page 18 of Exhibit N-11 was used in connection with the chocolate enrobing process. He also explained that the electrical power entering the plant is directed to 7 or 8 power panels in the plant installed under the Austin contract. He indicated that the process wiring and equipment in the plant could be removed without causing damage to the building. He said that electrical wiring in most instances goes through gyprock walls and is suspended from the ceiling and could therefore be removed easily.

Mr. Gamble testified that his company enjoys a 20-year lease of the building and has the right to purchase the building on the expiration of the lease for the sum of $1.00. He stated that the item shown as Engineering 5A shown on page 2 of the reported construction costs in the sum of $20,014.00 represented the cost of an engineering study of the feasibility of using the plant equipment in the old Moir's plant in Halifax in the subject plant.

On cross-examination Mr. Gamble stated that the process machines are secured to the floor by holding down bolts. He agreed that the building was specifically designed to accommodate chocolate manufacturing. In answer to a question from the Board Mr. Gamble stated that the plant could be used to manufacture candy products other than the ones actually produced at this time.

All three parties, the Director, the City of Dartmouth and Nabisco (Lowney's, Standard Brands) are in agreement that the cost approach is the appropriate one to arrive at the market value of the subject buildings and the machinery and equipment used in processing and manufacturing pursuant to Section 38 of the Assessment Act, R.S.N.S. 1967, c. 14.

Section 38 was amended by Statutes of Nova Scotia, 1984, c. 15. However, at all times material to this appeal Section 38 read as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

The Board having determined with the substantial agreement of the parties that the market value of the land in question including the improvements consisting of pavement and fencing is the sum of $647,900.00, must make a determination as to the market value of (1) the buildings assessable under Section 1(a)(v) of the Assessment Act, and (2) the machinery and equipment etc., assessable under Section 1(a)(vi) of the Assessment Act. The Board must also determine the amount of the business occupancy assessment pursuant to Section 7 of the Assessment Act.

With respect to determining the market value of the subject buildings the evidence as to value was given by Mr. Mills, the assessor on behalf of the Appellant, the Director of Assessment, and by Mr. Tolley on behalf of Nabisco. Both Mr. Mills and Mr. Tolley purported to use the cost approach to value and both relied on what have been described by both witnesses as actual costs of construction. These costs are shown on 6 sheets in Schedule 5 of the Mills appraisal report (Exhibit N-6) which are the same 6 sheets of costs found on pages 73 - 78 inclusive in the Tolley appraisal report (Exhibit N-8). The costs set out in these six pages are costs paid by Standard Brands to the Austin Company in connection with a construction contract respecting the subject property. Mr. Mills in finalizing previous assessments of the subject property had relied on a simple statement of costs obtained from Industrial Estates Limited and shown as Schedule 4 attached to the Mills appraisal report. Both Mr. Mills and Mr. Tolley carried out a process of editing or removing from the reported cost figures relating to the Austin contract those cost items which each considered not to relate to the building construction costs. It was because of the wide difference of opinion in allocating the Austin contract costs that resulted in the wide disparity between Mr. Mills estimate of market value of the subject buildings and that of Mr. Tolley.

Mr. Mills after editing the reported costs relating to the Austin contract arrived at an edited cost to October, 1975, of $3,907,800.00 for the main building and after adding in three additional costs provided to him by way of a letter from I.E.L. arrived at the amount of $3,975,708.00 as the total 1975 cost of the building. After adjusting this cost to January 1, 1980, and applying depreciation at 5% Mr. Mills arrived at a depreciated cost of $5,409,000.00 to which he added costs for the reefer trailer ($9,300.00), the machine room ($3,000.00) and the starch conditioning room ($65,400.00), for a total depreciated cost of buildings as of January 1, 1980, in the sum of $5,486,700.00.

Mr. Tolley on the other hand arrived at a building value of $3,930,000.00 after using the same base construction cost of $3,975,708.00 as used by Mr. Mills. Mr. Tolley estimated the 1975 costs to be $3,977,381.00 but chose to adopt Mr. Mills' figure of $3,975,708.00. Mr. Tolley however, then deducted from this figure the sum of $1,172,932.00 being his estimate of the Austin contract costs which he allocated to process machinery and equipment leaving as his adjusted 1975 building costs the sum of $2,802,776.00. After factoring this sum forward to January 1, 1980, and adding in the costs of the reefer trailer ($9,263.00), the machine room ($3,000.00), and the starch conditioning building ($65,419.00), fencing ($4,062.00) and pavement ($37,500.00) and taking depreciation at 5% he arrived at the sum of $3,930,000.00 as the market value of the subject building which is $1,456,700.00 lower than Mr. Mills' figure of $5,486,700.00.

While both Mr. Mills and Mr. Tolley were in agreement that the subject building is clearly in the category of a "special purpose" building they were far from agreement as to how the known costs should be allocated between the building and process machinery and equipment. Both Mr. Mills and Mr. Tolley described the subject building as a special purpose one specifically designed as a confectionary manufacturing plant.

The test used by Mr. Tolley in allocating costs to either building or process machinery and equipment was based on the function of the particular cost item. Mr. Tolley's method of allocating costs was to allocate these costs 100% to either building or process machinery and equipment where this was readily determinable or to portion some costs between building and process machinery and equipment based on his judgment.

In allocating costs as between building on the one hand and process machinery and equipment on the other hand Mr. Mills appeared to allocate costs to the building for wiring, piping, machinery etc. if these items were substantially integrated into and forming part of the building and were intended to form a part of a special purpose building designed to provide shelter for persons employed in the plant as well as providing shelter and the proper environment for the machinery and equipment used in the production of chocolates. Mr. Mills endeavoured to allocate to process machinery and equipment the cost of machinery and equipment and the cost of its installation actually used in the processing and manufacturing of chocolate.

Counsel for the Director filed a comprehensive post-hearing submission in which she stated at Page 8 that:

> "In general it is the position of the Director of Assessment that piping and wiring which forms an integrated part of the building is assessable as part of the building, even if the reason for much of the piping and wiring is to make possible the subsequent installation and use of special purpose equipment or create a particular environment to permit a certain processing or manufacturing operation to take place within that building or a certain area within the building."

She also stated at Page 8 that:

> "In addition the Director takes the position that architectural and engineering costs, site and building supervision, permits, taxes, etc., incurred by the building contractor are assessable as building even if the total costs would have been less to design and construct an ordinary industrial warehouse building."

At Page 37 of her brief, Counsel for the Appellant submits that:

> "Without the special electrical, mechanical, air and humidity control, this plant would be completely unsuitable as a chocolate manufacturing plant. It could not be used as such."

Counsel for the Director further submits that:

> "....all of the components of a special purpose building must be assessed as building. The machinery, including the hook-up costs should be assessed as processing and manufacturing equipment."

Counsel for the Respondent, the City of Dartmouth in her post-hearing memorandum submits that:

> "The Regional Assessment Appeal Court for Dartmouth erred in law in applying a 'purpose test' as the basis for the apportionment of assets between buildings under sub-section 1(a)(v) of the Assessment Act, R.S.N.S., 1967, c.14 and processing and manufacturing equipment under sub-section 1(a)(vi) of the Act."

She refers to the decision of the Appeal Division of the Supreme Court of Nova Scotia in Riverport Seafoods Ltd. v. Director of Assessment (1981), 44 N.S.R. (2d) 281 in which Hart, J.A., states at Page 287 that:

> "In my opinion, Mr. Lennon has done what the assessor should have done and has classified a certain amount of the fixed equipment as forming part of the building or structure in which it is located with the remainder being classified on the basis of its mobility as machinery, equipment, etc., under s.1(a)(vi)."

Based on the Riverport decision, Counsel for the City argues that:

> "...even if a particular unit could be considered equipment that forms part of an operational unit designed for or used in processing, if it formed part of the building in which it was

> located, it should be assessable pursuant to sub-section 1(a)(v). It is therefore necessary to determine whether a particular unit actually forms part of a building."

Counsel for the City also referred to the decision of Nicholson, J.C.C., in Dominion Textiles Ltd. v Town of Yarmouth et al (1983) C.Y. No. 2161. This case involved an appeal respecting the company's land and buildings and machinery and equipment. Nicholson, J.C.C., states at Page 3 that:

> "A secondary issue is whether or not the plant piping and wiring in that plant are part of the building or part of the equipment."

In purporting to be guided by the decision in the Riverport case, Nicholson, J.C.C., found that there was "a high degree of physical annexation of the wiring and piping into the plant structure." He also found that portions of the wiring and piping "might be salvaged, but only at the cost of damaging the building in the removal of it." He goes on to state that:

> "The evidence in this case shows that the plant piping and wiring had no mobility aspects to them at all, and would have no value whatsoever, except as part of the building. The object of the installation of the piping and special wiring was to improve the usefulness of the premises as a textile plant. In the absence of much piping and wiring the building would be completely unsuitable as a textile plant."

At Page 6 of The Dominion Textile case, Nicholson, J.C.C., states that:

> "In my view, the plant piping and wiring to which we are referring here were physically affixed to the building for the purpose of improving the usefulness of it as a textile plant, and they are in the nature of fixtures that have no value whatsoever when separated from the building."

Nicholson, J.C.C. then finds that "the piping and wiring forms part of the building and are fixtures."

Counsel for the City made reference to the Supreme Court of Canada case, Haggert v. Town of Brampton et al, (1897), 23 S.C.R. 174 relied on by Nicholson, J.C.C. in the Dominion Textiles decision. In the Haggert case, King, J. stated at Page 182 that:

> " In passing upon the object of the annexation, the purpose to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and showing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are becoming part of the realty, at least in questions as between mortgagor and mortgagee."

Counsel for the City submits that ".....that in order for an article to be considered as forming part of the building, it must be shown that there exists an intention of permanent affixing for as long as the article serves its purpose. One must consider both the degree of annexation as well as the object of annexation." She further submits that the items in issue in this appeal, namely the plant piping, wiring and cooking systems and the equipment which provides a controlled environment, form part of the building. She submits that "with respect to the equipment which provides a controlled environment, this equipment is again physically affixed to the building" and "the assets in issue are all physically affixed to the building. The object of their installation was to improve the usefulness of the premises as a chocolate and confectionery plant. In the absence of these assets, the building would be completely unsuitable for this purpose. Most importantly, the assets have no mobility aspects to them at all. They have been in place since their original installation. Even though certain of these assets in issue are capable of being disassembled to some extent, there still exists a physical affixing to the building and there is a permanence of the nature referred to in Haggert v Brampton. Therefore, the assets form part of the plant structure itself."

Counsel for the City refers to the decision of this Board in the case of the Director of Assessment v. Oxford Frozen Foods Ltd. dated July 17, 1984 reported in Vol. Three - A - 1984, page 115 of the Board's reports. At Page 137 of that case, the Board states that:

> "Assuming the bulk freezer units are 'equipment' or 'other things' that form an integral part of an operational unit designed for or used in processing, in the opinion of the Board, if they formed part of the building in which they were located, they should be assessable pursuant to Sub-section 1(a)(v)."

The Board in the Oxford Frozen Foods case held that the freezer units were assessable as part of the building in which they were located pursuant to Section 1(a)(v) of the Assessment Act.

Counsel for Nabisco (Lowney's) filed both a pre-hearing submission as well as a post-hearing submission. In his post-hearing submission he acknowledges that the parties are in agreement that the cost approach is the appropriate one to be taken in valuing both the land and buildings and the manufacturing and processing equipment. He submits, and the Board agrees, that the issues before the Board are:

> "Whether the services installed to provide electricity, steam, hot and cold water, compressed air and gas to the various process machinery is properly considered part of that machinery rather than part of the building and so assessable as machinery, and whether the environmental controls installed in portions of the plant as being necessary for the process are properly assessable as machinery and equipment. From that, one must then proceed to find an appropriate method of extracting these costs from the total Austin costs, bearing in mind the limited information which is available in that respect."

Counsel for Nabisco makes reference to the Riverport Seafoods case and submits that while the decision in Riverport suggests a "mobility" test in determining whether an element should be assessed as manufacturing machinery and equipment under Section 1(a)(vi) or as building under Section 1(a)(v) he submits that "this is not a necessary test".

Counsel for Nabisco at Page 4 of his post-hearing submission states that:

> "...it is to be noted (and it is submitted it is of great importance in this appeal) that the machinery and equipment which was so classified in the Riverport Seafoods case was not limited to those elements which could in fact be moved from place to place in the building."

He goes on to state that:

> " It is important to note that in the Riverport Seafoods case the proportionate value of the entire system which was attributed to the production use was assessed as manufacturing and production equipment."

Counsel for Nabisco in relying on his interpretation of the Riverport Seafoods case continues by stating that:

> "...in Riverport Seafoods it was not only the plate freezers and other items sitting on the floor which were assessable as processing and manufacturing equipment, but the proportionate part of the entire system including the compressors in the compressor room, the condensors on the roof and the pipes running through the building."

He then submits that:

> "This case is entirely the same. These elements are put into the building for processing and manufacturing only. That is their purpose and use and appropriate classification for assessment purposes."

On the question of how to apportion the costs relating to the Austin contract, Counsel for Nabisco observes that "...only limited information has been available to the parties from the Austin Company and some effort (as best may be done) must be made to break out those costs."

Counsel for Nabisco submits "that the assessment as set by the Regional Court should be upheld by this Board...".

The Board accepts the evidence of the assessor, Mr. Mills, concurred in by the appraiser, Mr. Tolley, that the cost approach is the appropriate method of evaluating the land and buildings as well as the manufacturing machinery and equipment which are the subject matter of this appeal. Both the assessor and Mr. Tolley purport to base their estimates of value for assessment purposes on "actual costs" available to them both, in the form of recorded costs resulting from the construction contract entered into by the owner (Standard Brands Limited) with the Austin Company Limited. These costs are shown as Schedule 5 in the Mills Report (Exhibit N-6) and the same costs are shown in the Tolley Report (Exhibit N-8) in Section 8.1. Unfortunately some of these costs relate to expenditures clearly in the category of building costs while others appear to relate to non-building costs. Both Mr. Mills and Mr. Tolley carried out a process of editing these costs by deleting those costs they considered were non-building costs and allocating the deleted costs to either machinery and equipment used in production or to some other category.

Both Mr. Mills and Mr. Tolley applied their own judgment in making the necessary deletions and allocations relating to the Austin contract. The Austin contract was not made an Exhibit at the hearing before the Board. Exhibit N-15 consists of a 45 page specification outline for a "new candy plant for Standard Brands Limited" revised to November 20, 1973. In the description of the work to be performed by Austin in the specification outline it states that:

> "The proposed work consists of the design and construction of a candy plant and offices on the owner's site in Dartmouth, Nova Scotia."
>
> At Page 29 of Exhibit N-15 under the heading "Mechanical Ventilating" it states that:
>
> "A summer ventilating system will be provided in the areas as listed in the table on Page 30, which will also indicate the ventilation rate and conditions."
>
> It also states that:
>
> "Process ventilation will be provided for year round operation for heat removal, hoods exhaust, fumes exhaust, etc., as shown on attached table on Page 30."

It is thus clear that some of the costs incurred by the owner under the Austin contract relate to "process ventilation."

The Regional Assessment Appeal Court's decision refers to the Riverport Seafoods case and quotes a portion of the decision of Hart, J.A., from Page 287 of that decision as reported in 44 N.S.R. (2d) 281. The decision of the Regional Court then states that the Court (in the Riverport case) had before it an "appraisal which separated building from equipment on the basis of the mobility of the latter. The court had rejected the approach taken by the assessor, and in accepting the valuations of the appraiser, I do not believe Hart, J.A. was endorsing mobility as the legal test...". The Regional Court decision then states that:

> "I have concluded that the legislature in enacting section 1 of the Assessment Act intended to introduce a "purpose" test, to guide the allocation of assets between buildings under subsection (a)(v) and equipment under subsection (a)(vi). Our Court of Appeal has correctly interpreted that the test of annexation or affixation under the old law of fixtures no longer applies. Nor then, should the test of mobility apply. Application of a mobility test would be inconsistent with the intention of the legislature as indicated by the inclusion of "supporting foundations and footings" in section 1(a)(vi). In reaching this conclusion, I have had regard to section 7 (1)(b) which excludes from business occupancy assessment equipment which does not provide services to buildings. If the purpose of the equipment is to provide services to a manufacturing process, and not to the buildings which provide shelter for that process, then it is not assessable for business occupancy, even though affixed to land and buildings.
>
> The effect of section 7(1)(b) is to exclude any structure which is not a building providing shelter for people, plant, or moveable property, or such machinery, equipment, apparatus and installations as exist for the purpose of providing services to the buildings. Excluded therefore from business occupancy assessment is the processing and manufacturing equipment which section 1(a)(vi) seeks to include within assessable property. As a taxing statute, the Assessment Act is required to be clear and

> unequivocal in defining what will be subject to taxation. I accept in principle therefore, there are certain systems which although constructed as part of the Moirs Plant, exist solely for the purpose of use in the processing or manufacturing carried on there. While I have some questions about the approach of Mr. Tolley in valuing such systems and the machinery and equipment comprising them, his is the only valuation before me. The Director of Assessment chose to insist upon application of the mobility test, and therefore did not place before this court a competing valuation.
>
> The 1983 assessment will therefore be as follows:
>
> | | |
> |---|---|
> | Land and Buildings | $4,530,000.00 |
> | Business Occupancy | 2,265,000.00 |
> | Processing and Manufacturing Equipment | 2,141,000.00" |

It is my view that the learned Judge of the Regional Assessment Appeal Court was correct in his conclusion that the legislature intended to introduce a "purpose" test to assist an assessor in allocating the assessable property between buildings under s.s. (a)(v) and machinery and equipment that form an integral part of an operational unit designed for or used in processing or manufacturing under s.s. (a)(vi) of Section 1 of the Assessment Act. Mr. Tolley in making allocations of property as between Section 1(a)(v) and 1(a)(vi) did so based on the function performed by the various items of property. If the function was to service the building Mr. Tolley allocated that property to the building. If its function was to service the machinery and equipment used in manufacturing and processing he allocated it to machinery and equipment under Section 1(a)(vi). Where the property performed two functions Mr. Tolley exercised his judgment based in part on plans he had examined and allocated a portion of the cost of such joint use properly to building and a portion to machinery and equipment.

It is my opinion that the degree of annexation of piping and wiring etc. to the building and the effect its removal would have on market value is not the proper approach to take in assessment cases in determining whether the value of any particular piece of equipment should be included under Section 1(a)(v) or 1(a)(vi) of the Assessment Act. This approach had previously been used when the law of fixtures was applied to distinguish personal property from real property for assessment purposes. As Hart, J.A., stated in the Riverport Seafoods case, the Assessment Act "refers only to assessable property and no reference is made to fixtures in the definition section. It is therefore necessary for an assessor to include part of what may have previously been a fixture in determining the value of buildings and structures under paragraph 1(a)(v) and another part under 1(a)(vi) when valuing the manufacturing equipment."

I have difficulty with the Regional Court's conclusion that the "Application of a mobility test would be inconsistent with the intention of the legislature...". It is my view, based on the Riverport Seafoods decision, that mobility is a factor which should be taken into consideration in the rather difficult task of allocating costs of fixed equipment under Section 1(a)(v) and 1(a)(vi). Whether one describes "mobility" as a test or not is not the issue. Hart, J.A., in the Riverport decision clearly indicated that the assessor should have "classified a certain amount of the fixed equipment as forming part of the building or structure in which it is located with the remainder being classified on the basis of its mobility as machinery, equipment etc., under Section 1(a)(vi)". (emphasis added).

In my view, the assessor should first of all allocate or classify those items of fixed equipment as part of the building under Section 1(a)(v) which are so attached, integrated or annexed to the building that they are part of the building as for example, the bulk freezer units referred to in the Oxford Frozen Foods case or that portion of the freezing equipment referred to in the Riverport case which was incorporated into the building. Secondly, the assessor should classify the "remainder" of the fixed equipment based on its "mobility" as process machinery, equipment etc., under Section 1(a)(vi). Supporting foundations and footings for machinery, equipment appliances, storage and working tanks and "other things" that "form an integral part of an operational unit designed for or used in processing or manufacturing" are expressly classified as assessable property under Section 1(a)(vi) of the Assessment Act.

It is my opinion that Mr. Tolley in breaking out the actual costs of various items of fixed equipment incurred by the owner under the Austin contract and allocating these costs to the building under Section 1(a)(v) or to process machinery and equipment under Section 1(a)(vi) according to their function did so to the best of his knowledge and ability and in accordance with the provisions of the Assessment Act and with the law as stated in the Riverport Seafoods case. There is no doubt that

Mr. Tolley exercised his professional judgment in making these allocations and the Board is prepared to accept his judgment in this regard. Mr. Tolley's methodology of using function or purpose as a test is correct and while issue might be taken with some of Mr. Tolley's breakdown of costs, his evidence is the only evidence before the Board in this matter and the Board accepts it. Mr. Mills' methodology in employing a test based on "mobility" is incorrect in allocating fixed equipment between Section 1(a)(v) and 1(a)(vi). This is so despite the fact that there are some slight errors in the Tolley appraisal report which are not significant in relation to the total assessment values of the subject property. Mr. Tolley, by his own admission, is not expert in the evaluation or appraisal of machinery and equipment. He did, however, go through an elaborate process of removing certain actual costs from the Austin contract ($1,170,731.00) and allocating these deleted costs to the costs of machinery and equipment used in the processing and manufacturing of candy. He arrived at his total valuation of the machinery and equipment used in processing and manufacturing by taking 50% of the costs deleted from the Austin contract which he had allocated to machinery and equipment (50% of $1,170,731.00 = $585,365.00) and then added this figure to the sum of $1,555,800.00 being the assessed value of processing machinery and equipment determined by the assessor at the hearing before the Regional Court to arrive at the amount of $2,141,165.00 rounded to $2,141,000.00 as the assessed value of the machinery and equipment and this is the amount of the 1983 assessment determined by the Regional Court. Mr. Mills in his evidence before the Board stated that he had recommended to the Regional Court a valuation of $1,555,800.00 for manufacturing equipment but had since changed his valuation figure to $1,557,800.00 in order to correct an error in his original calculation. An explanation for this $2,000.00 difference is given at page 22 of this decision. His estimate of land value of $600,000.00 is substantially in agreement with Mr. Mills' estimate of $647,900.00 which includes the value of the pavement ($43,500.00) and fencing ($4,400.00).

Mr. Tolley's estimate of the assessed value for 1983 of the buildings in the amount of $3,930,000.00 is accepted by the Board. His estimate of the assessed value of the machinery and equipment of $2,141,000.00 under Section 1(a)(vi) must be adjusted upwards by $2,000.00 to take into account the $2,000.00 error by Mr. Mills. The Board accepts the evidence of Mr. Mills as to the assessed value of a portion of the machinery and equipment in the amount of $1,557,800.00 and also accepts Mr. Tolley's evidence as to the value of additional machinery and equipment in the amount of $1,170,800.00 one half of which ($585,365.00) must be therefore added to the sum of $1,557,800.00 to arrive at $2,143,165.00 rounded to $2,143,000.00 as the value of the machinery and equipment for the 1983 assessment year.

Neither Mr. Mills nor Mr. Tolley claimed to be expert in the valuation of machinery and equipment used in processing or manufacturing. Both, however, relied on what they considered actual costs. Some of the actual costs included costs relating to both buildings under Section 1(a)(v) and machinery and equipment under Section 1(a)(vi). Mr. Mills was unable to break down costs into the two categories while Mr. Tolley did so on the basis of his judgment after having considered the function of the elements. Mr. Tolley's evidence as to the breakdown of these costs is the best evidence available to the Board in this regard.

The evidence of Mr. Mills that the practice in Nova Scotia is to assess manufacturing and processing machinery and equipment by taking original costs and depreciating those costs at 50% does not in my opinion comply with the requirements of Section 38 of the Assessment Act which requires all property to be assessed at its market value. This practice is obviously a convenient one from the assessor's point of view but does not in my opinion result in assessments which can be equated to market value. Unfortunately, Mr. Tolley also relied on this practice in arriving at his assessed value of the machinery and equipment. Under this practice ten year old machinery would have the same assessed value as twenty year old or two year old machinery assuming that original costs are the same.

The Appellant's Notice of Appeal sets out thirteen specific grounds of appeal together with a fourteenth ground which reads "such other grounds that may appear from the evidence." In my opinion none of these grounds of appeal are valid and the appeal is therefore dismissed.

In the result, the Board determines the 1983 assessments of the property known as the Moir's Chocolate factory as follows:

(1)	land	$ 647,900.00	
(2)	buildings	$3,930,000.00	$4,577,900.00
(3)	manufacturing and processing equipment		2,143,000.00
(4)	business occupancy (50% of $4,577,900.00)		2,288,950.00

The Respondent, Nabisco (Lowneys, Standard Brands) shall be entitled to its costs from the Appellant, the Director of Assessment to be taxed on a party and party basis.

An order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 20th day of September, A.D., 1985.

RH Blois

R.H. BLOIS

CHAIRMAN, NOVA SCOTIA
MUNICIPAL BOARD.

Cape Breton Turf Club Ltd. v. Director of Assessment

ASSESSMENT--COMMERCIAL, RESIDENTIAL, BUSINESS OCCUPANCY--MARKET VALUE--INCOME METHOD--EFFECT OF POOR MANAGEMENT--COST METHOD--DEPRECIATION FOR ECONOMIC OBSOLESCENCE--ASSESSOR WISHING TO INCLUDE IN BUSINESS OCCUPANCY AREAS PREVIOUSLY EXCLUDED--ASSESSMENT ACT, SS.25B(1),38

This is an appeal from a decision of the Cape Breton Regional Assessment Appeal Court confirming the 1983 assessment of the Cape Breton Sports Centre in the amount of $1,012,500.00, made up of $778,400.00 commercial, $11,600.00 residential and $222,500.00 business occupancy. The residential assessment relates to a mobile home used as a residence by a security person. The subject property is a horse racing track with nine buildings featuring pari-mutual wagering.

HELD: The Board allows the appeal and determines the 1983 assessment to be $8,000.00 residential, $491,000.00 commercial and $230,100.00 business occupancy. The Appellant is entitled to costs taxed on a party and party basis on the County Court scale.

The subject property lends itself to valuation by the income method. It is an income producing property similar to other income producing properties such as hotels, motels, office buildings, apartment buildings and shopping centres. The Board disagrees with the Director's submission that the income method is not appropriate due to the poor performance of the Appellant's management. The income method is appropriate even if management is not performing well. Loss in value due to poor management should be estimated by reference to market data. In this appeal there was no evidence based on market data indicating the income of the subject property would have been substantially higher with better management. The Board accepts the normalized statement of net income and the capitalization rate of 15% presented on behalf of the Appellant. The cost method is not entitled to great weight here. One difficulty in its use is in estimating the amount of depreciation, in particular the amount of functional and/or economic obsolescence. Here the assessor used a completely subjective estimate of 20% for economic obsolescence, while the Appellant's appraiser used 77%, which is likewise rejected. Another problem with the cost method in this appeal is in arriving at a reliable market value for the land component. Here the Appellant and the assessor were far apart and the Board finds that neither determination is sufficiently reliable. A third concern with the assessor's estimate by the cost method is the accuracy of his calculations of reproduction costs of the various buildings. The Board rejects consideration of an apparent sale of the subject property in 1984 because the Board is not satisfied that the property actually sold for $2,200,000.00 and the sale was almost 18 months subsequent to the date for determining the 1983 assessment. The Board also does not accept that the Appellant should now be assessed for business occupancy for the infield and track areas when the only business occupancy assessment before the Board is one by the assessor which did not include these areas.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967 Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by Cape Breton Turf Club Limited from a decision of the Regional Assessment Appeal Court, Cape Breton Assessment Region

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: FRANK L. ELMAN, Q.C., and DUNCAN MACEACHERN, LL.B., Articled Clerk for the Appellant;

DOUGLAS J. KEEFE, LL.B., for the Director of Assessment.

DECISION

By Notice of Appeal dated December 21, 1983, received by the Board on December 23, 1983, the Appellant, Cape Breton Turf Club Limited appealed the decision of the Regional Assessment Appeal Court, Cape Breton Assessment Region, made November 15, 1983 confirming the 1983 assessments of the Appellant's property located on the north side of Prince Street and east of Welton Street and known as the Cape Breton Sports Centre fixed by the Regional Assessment Appeal Court, Cape Breton Assessment Region, in the amount of $1,012,500.00.

The Assessment for 1983 was as follows:

Commercial	$ 778,400.00
Residential	11,600.00
Business Occupancy	222,500.00
Total Assessment	$ 1,012,500.00

The residential assessment relates to a mobile home used as a residence by a person who is responsible for security at the Sports Centre. The business occupancy assessment is with respect to the entire property with the exception of the mobile home, the racetrack and the infield.

There were no objections to the Board's jurisdiction to hear the appeal and the Board proceeded to hear the appeal on the merits.

The decision of the Regional Assessment Appeal Court in its entirety reads as follows:

> "On the basis of the evidence before me and the submissions of the parties, I am satisfied that the assessment of this property at $1,012,500.00 is fair and reasonable and I do hereby confirm the same."

The Appellant's Notice of Appeal sets forth the following grounds of appeal:

> "(a) THAT the Chairman failed to properly consider the arguments put forth by the Appellant.
>
> (b) THAT the assessment is based upon an excessive valuation of the property."

The issues to be decided in this appeal are the valuation of the residential property, the valuation of the commercial property and the amount of business occupancy assessment.

Evidence on behalf of the Appellant was given by Roger Garabb and Victor Goldberg, Directors and Shareholders of the Appellant, and Michael Turner, M.Sc., A.A.C.I. and Lee Weatherby, A.A.C.I., A.R.I.C.S., accredited appraisers. Evidence on behalf of the Director of Assessment was given by Robert Gregor an Assessor in the Cape Breton assessment region.

The Appellant's property is a horse racing track with nine buildings featuring pari-mutual wagering. The racetrack property is located on an interior parcel of land between Prince Street and Weldon Street in the City of Sydney. Access to the property is by way of a 200' wide strip of land on the north side of upper Prince Street. The land immediately adjacent to the north of the subject property, interspersed between it and Weldon Street, is developed with a shopping centre known as the K-Mart Plaza. Weldon Street is developed with various commercial uses. The lands immediately adjacent to the south, west and east of the subject property are developed with single family, duplex and apartment residential units. Some of the land to the east of the subject property is undeveloped.

The land is irregular in shape and it is shown on a site plan forming part of the Turner, Drake + Partners Ltd.'s Appraisal Report filed as Exhibit C-3. The assessor, Mr. Gregor, computed the total area of the subject property at 22.68 acres from Land Registry and Information Service Map No. 4 and 9-6XSW while Mr. Weatherby, on behalf of the Appellant, computed the area at 24.23 acres including .79 acres under lease from the City of Sydney. The property is subject to a sanitary sewer easement in favour of the City of Sydney approximately 880' long and 15' wide running through the center of the property.

Site improvements include 10,150 sq.ft. of ashphalt paving, 2,200 lineal feet of fencing, approximately 51 lighting fixtures, a 1/2 mile oval race track with crushed rock surface, a diesel fuel tank and a water tank. The property is serviced by a main sewer, water lines, telephone and electrical lines.

The buildings and structures located on the property include a grand stand building which contains facilities for wagering, a seating and viewing area, a dining and drinking area and office space, three barns used as stables, a paddock barn used as a holding area for horses, a blacksmith shop used as a blacksmith shop and veterinarian's room, tote board, a mobile home used as a residence for security personnel, a kiosk building used as a security booth for entrance to the paddock area, a ticket booth, a lean-to for the storage of hay and wood chips and another small building used for storage. Another structure known as the observation post is derelict and is not being used.

Most of the land is zoned Recreational and its present use is a non-conforming use. A small area of the site abutting Prince Street is zoned Highway Commercial.

The grandstand and horse stalls were destroyed by fire and rebuilt in 1975.

Roger Garabb of Sydney is a shareholder and Director of the Appellant. He, along with Frank McInnis, Peter Foy and Victor Goldberg, purchased the shares in the Appellant during the summer of 1984, subsequent to the present appeal being filed with the Board. Mr. Garabb stated the present intent of the new owners is to use the property as a race track. On cross-examination, Mr. Garabb stated that he felt the previous management of the Appellant was not doing very much to promote the race track. He became involved in the purchase of the Appellant because he thought the race track could perform better and he could do a better job operating the race track than the previous management.

Mr. Goldberg of Halifax said that he, Mr. Garabb, Mr. Foy and Mr. McInnis agreed to purchase the shares of the Appellant for $1.00 on the condition that satisfactory arrangements could be made to pay off the large debt (in the vicinity of $2,200,000.00 to $2,500,000.00) owed by the Appellant. At the time of the share purchase, Mr. Goldberg said that the Appellant had an accumulated deficit of $600,000.00 and was losing $150,000.00 to $200,000.00 a year. He said the Appellant was not able to service the existing debt out of current operations. The new shareholders were trying to convert some of the debt to preferred shares and had made short term arrangements with existing creditors to service part of the existing debt as a reduced interest rate.

Michael Turner, M.Sc., A.A.C.I. is a member of the Appraisal Institute of Canada and President of Turner Drake + Partners Ltd., a Real Estate Consultant and Appraisal Company. He gave expert opinion evidence respecting the market value of the subject property for the 1983 assessment year on behalf of the Appellant. He and Lee Weatherby, A.A.C.I., a consultant with Turner Drake were the joint authors of an Appraisal Report with respect to the subject property, a copy of which was filed as Exhibit C-3. Mr. Turner's responsibilities in the preparation of the Report included an estimate of market value by the income method, determining the amount of economic obsolescence for use in the cost method and calculating the amount of business occupancy assessment. Mr. Weatherby's responsibilities in the preparation of the Report included calculating the reproduction costs of the various buildings and structures on the site, estimating physical depreciation and estimating a land value, all as part of an estimate of value by the cost method, and calculating the market value of the machinery and equipment as part of the estimate of value by the income method.

Section 38 of the Assessment Act as it then existed reads as follows:

> " All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Mr. Turner and Mr. Weatherby estimated the market value of the subject property for the 1983 assessment year as at December 1, 1982. The market value so determined was then adjusted by the general level of assessment to comply with the uniformity requirements of Section 38 of the Act.

In the opinion of Mr. Turner, the most appropriate method to use in valuing the subject property is the income method because the race track is an income producing property.

Mr. Turner calculated the market value of the subject property by the income method as follows:

Revenue	1,439,104
Expenses	1,304,902
Net operating income	134,184
Capitalization Rate @ 20.94%	÷ .2094
	$ 640,802
Less: Machinery and Equipment	$ 87,000
Capital Value of Real Estate	$ 553,802
Rounded to:	$ 554,000

Mr. Turner prepared a statement of stabilized income for the year ending November 30, 1982 based on 104 racing days in the year. The stabilized estimates of revenue and expenses are the revenue and expenses one would expect in a normal operating year, a practice also referred to as "normalizing" revenues and expenses. The revenue and expense items were expressed in 1982 constant dollars.

In preparing the statment of stabilized income and expenses, Mr. Turner reviewed the income statements of the Appellant for the years 1977 to 1982, interviewed the race track manager Mr. Curry, spoke with the Appellant's accountant, examined the April 1981 Touche Ross & Company Report which was a financial feasibility study of the Appellant prepared at the request of the Nova Scotia Resources Development Board and reviewed the information available to off-track betting authorities.

Mr. Turner reviewed each item of income and expenses listed in the financial statement of the Appellant for the prior six years. He placed greater weight on the revenue and expense figures for the years 1980, 1981 and 1982 than for the years 1977, 1978, 1979 in the preparation of his statement of stabilized income and expenses. By adjusting each item of revenue and expense for any unusual occurences or omissions and in many instances taking an average of the revenue and expense figures of the last three years, Mr. Turner arrived at a gross operating income of $1,439,104.00 and total expenses of $1,304,902.00. Subtracting the expenses from the revenue resulted in a net operating income of $134,184.00.

Mr. Turner applied a capitalization rate of 20.94% to the net operating income which produced a capital value of $640,802.00. The capitalization rate included an overall capitalization rate of 15% and a rate to cover real estate taxes and business occupancy taxes of 5.94%.

Mr. Turner said that since he was not aware of any sales of race tracks from which he could derive a capitalization rate, he compared the subject property with other income producing properties. According to Mr. Turner, good quality office buildings located in the central business district of Halifax, which appeal to institutional type purchasers, sell at an overall capitalization rate of 8.5% to 10%; regional shopping centres in the Halifax Metropolitan area such as Mic Mac Mall and Bayers Road Shopping Centre sell at overall capitalization rates of 11%; community shopping centres such as Sunnyside Mall in Bedford sell at a capitalization rate of approximately 12.5%. Mr. Turner also referred to the K-Mart Shopping Centre, a community shopping centre located to the north of the subject property, which sold for an overall capitalization rate of 10.81% in 1982. According to

Mr. Turner, this same property would have sold at 12% to 12.5% in the 1982 atmosphere of high interest rates. Mr. Turner said that properties requiring a high degree of management such as hotels, depending on their size and location, sell at capitalization rates in the 12% to 16% range.

At Page 103 of his Appraisal Report, Mr. Turner states:

> "None of the above allows us to conclusively derive a capitalization rate for the subject property. However, it does paint the background against which the subject property can be viewed. The subject property is similar to a hotel in that it requires a large amount of entrepreneurial effort to make it succeed. It also requires a large capital investment in equipment which depreciates rapidly. It is, in our opinion, less secure than a hotel since its cash flow is not derived on a 365 day year basis, but has to be attained during four hours, on each of 104 nights of the year. It has a substantial investment in fixed equipment, land and buildings which have to be maintained. It is competing for the betting dollar against government lotteries which daily increase in scale. As an investment, it is a masochist's dream.
>
> Having regard to the foregoing, we are of the opinion that an overall capitalization rate of 15% is appropriate to reflect the risk inherent in this type of investment."

Mr. Turner finds further support for his selection of a 15% capitalization rate from the decision of the Halifax County Regional Assessment Appeal Court in the 1981 assessment appeal of the Sackville Downs Raceway. The Regional Court Judge in that appeal accepted a capitalization rate of 12% for the Sackville Downs Raceway. According to Mr. Turner, interest rates and capitalization rates have risen since that date. He also said that the Sackville Downs income is more secure than the Appellant's income because the track is located in the largest metropolitan area in Atlantic Canada. Therefore, the capitalization rate for Sackville Downs would be lower than the Appellant's capitalization rate because of its more secure income base.

Real estate taxes and business occupancy taxes were not included as an expense. Mr. Turner included them as part of the capitalization rate. Part of the real estate is classified as Residential and the remainder is classified Commercial. The tax rate of 5.94% computed by Mr. Turner was a blended rate taking into account residential real estate taxes, commercial real estate taxes and business occupancy taxes.

In Mr. Turner's opinion, the financial statements of the Appellant reflect normal management and the Appellant's net income is not materially affected by poor management practice.

The capital value of $640,802.00 determined by the income method included a value for machinery and equipment which are not assessable property under the Assessment Act. Mr. Weatherby determined a market value for machinery and equipment of $87,000.00 based on the machinery and equipment's "break-up" value and not its value as part of a going concern. The value of machinery and equipment was determined using the "replacement cost less depreciation" method and by discussion with local contractors. The original costs of the machinery and equipment were taken from the summary of fixed assets included in the Appellant's 1982 financial statements. Mr. Weatherby was advised by Mr. Curry, the Managing Director of the race track, that most of the machinery and equipment was acquired in the years 1976 or 1979. Original costs were escalated up to the appraisal date (December 1982) using the Marshall and Swift Comparative Equipment Cost Index. Depreciation of equipment, furniture and fixtures was based on Marshall and Swift's fixture and equipment depreciation percentage table to arrive at a going concern value. The "break-up" value of the equipment, furniture and fixtures was taken at 50% of the "going concern" value. Subtracting the $87,000.00 figure for machinery and equipment from the capital value of $640,802.00 produced a capital value for the real estate of $553,802.00 rounded to $554,000.00, the market value estimated by the income method.

The Turner Drake Appraisal report also includes an estimate of market value by the cost method. Turner Drake estimated the market value of the cost method to be $554,000.00 which is identical to their estimate of market value by the income method.

The market value by the cost method is arrived at by valuing the land and adding to the land value the depreciated value of any improvements to the land.

Lee Weatherby, A.A.C.I., is an Appraisal Consultant with Turner Drake + Partners Ltd. He prepared the estimate of land value of the subject property and calculated the replacement cost of the various buildings and site improvements as well as estimating the rate of physical depreciation to apply to the buildings and site improvements.

In Mr. Weatherby's opinion, the market value of the subject land restricted to its present use as a horse racing track is $123,000.00. At Page 70 of the Turner Drake Report, Mr. Weatherby listed four factors he considered in estimating the market value of the subject land:

> "(1) The site is "boxed in" by existing development and future expansion of the race track facilities is not possible.

(2) The site has no frontage to Welton Street and generally has poor traffic exposure.

(3) Access to the site is poor and this fact, coupled with its limited exposure, virtually restricts its use to local patrons. It is poorly positioned to capture tourist traffic.

(4) Parts of the site are wet and prone to flooding in heavy rainfall. This necessitates constant maintenance of the race track, particularly the north east corner which requires periodic filling."

Mr. Weatherby prepared a land sale schedule in which he provided details on the sales of eight comparable parcels of land he considered in determining the land value of the subject site. Six of the comparables were sales of land while the remaining two comparables were offers to buy which did not result in a sale. In one instance, financing could not be arranged and in the second instance, the vendor refused the offer. Mr. Weatherby gave little weight to the offers which did not result in a sale in arriving at his final opinion of land value for the subject site. Two of the properties sold in 1979, one in 1980, one in 1981, one in 1982 and one in 1984. The sale prices were adjusted at 5% per year compounded from the date of sale to December 1982, the effective date for determining the market value of the land. The property selected varied in size, street or highway frontage, slope and coverage of site. All properties were located in the Municipality of the County of Cape Breton. At Page 7 of the Turner Drake Report, Mr. Weatherby states:

> "We have detailed the sales of comparable parcels of land on the Land Sales Schedule and Map on the following pages. The development potential of each of the

> comparables has been considered in relation to the subject property as though restricted to its present use. In this regard, we consider that a prospective purchaser would pay no more for the subject site, restricted to its use as a horse racing track, than for an alternate site in a more rural location, equally appropriate for such a facility. This is considered in our valuation."

The sales prices of the six properties which sold range from $4,090.00 per hectare to $24,819.00 per hectare. Based on his analysis of these sales and taking into consideration the factors mentioned above, Mr. Weatherby estimated the land value of the subject site as of December 1982 to be $12,500.00 per hectare. He agreed that there was some element of subjectivity at arriving at his final figure of $12,500.00. He calculated the land value to be $122,625.00 (9.81 hectares at $12,500.00) which he rounded to $123,000.00.

In estimating the reproduction costs of the various buildings and structures, Mr. Weatherby derived his cost estimates from several sources. He estimated the reproduction cost of the grandstand using the original contract price of construction in 1975 escalated for cost increases to December 1982 using the non-residential construction cost input price index for the Atlantic Provinces by Statistics Canada. Some interior finishing costs were developed from the "1982 Yardsticks for Costing" Manual. The reproduction cost of the three stables, the blacksmith building, the paddock barn, the hay storage building and the tote board building were calculated using Marshall and Swift Computerized Costing Service. The remaining structure, such as the ticket booth were costed using Boeckh's Building Valuation Manual. When actual construction costs were available, the reproduction costs calculated using the various costing services were verified by escalating the actual construction costs to December 31, 1982 using the non-residential construction cost input price index.

Mr. Weatherby estimated the reproduction costs of all buildings and structures at $2,365,156.00,the reproduction costs of site improvements at $257,644.00 and the reproduction cost of the mobile home at $24,304.00 for a total reproduction cost of buildings, site improvements and mobile home of $2,647,104.00. The cost of site improvements were derived from actual cost data provided by the Appellant and the three costing services namely

1982 Yardsticks for Costing
Boeckh's Building Valuation Manual
Marshall and Swift Valuation Service

The reproduction cost of the mobile home was based on information received from a local Mobile Home Dealer.

Mr. Weatherby used the age - life method in estimating the amount of physical depreciation. He considered each of the buildings and site improvements and the mobile home separately for purposes of calculating physical depreciation. The total amount of physical depreciation calculated by Mr. Weatherby was $795,604.00. Subtracting the amount of physical depreciation of $795,604.00 from the total of the reproduction cost of the buildings, site improvements and mobile home of $2,647,104.00, Mr. Weatherby arrived at a total depreciated cost of building, site improvement and mobile home of $1,851,500.00. The depreciated cost of the mobile home included as part of this figure, was $8,020.00.

Mr. Turner calculated the amount of economic obsolescence which he described at Page 83 of the Turner Drake Report as "that loss in value experienced by a structure as a result of negative forces external to the property itself". In his opinion, economic obsolescence existed in the subject building because of the shifting pattern of betting and entertainment away from harness racing. According to Mr. Turner "the method promulgated by major appraisal institutes, such as the Appraisal Institute of Canada, is to estimate the net rental loss resulting from the locational obsolescence and then to capitalize that rental loss at the capitalization rate appropriate to the property being appraised".

Mr. Turner calculated the amount of economic (locational) obsolescence in the subject property as follows:

" Buildings and Site Improvements (depreciated for Physical Obsolescences)	$1,851,500
Equipment (break-up value)	87,000
Land Value restricted to race course use	123,000
Total	$2,061,500
Capitalization Rate @ 20.94%	x 0.2094
Rental Value before Locational Obsolescence	$ 431,678
Less Net Operating Income	134,184
Rental Loss due to Locational Obsolescence	$ 297,494
Capitalization Rate @ 20.94%	÷ 0.2094
Locational Obsolescence	$1,420,697"

The value of the subject property by the cost method was calculated as follows:

"Land Value		$123,000
Value of Buildings, Site Improvements and Mobile Home:		
Reproduction Cost	$2,647,104	
Less: Physical Depreciation	795,604	
	1,851,500	
Less: Economic Absolescence	1,420,697	430,803
		553,803
		554,000"

Mr. Turner applied the general level of assessment of 90%, which he obtained from the Regional Director of Assessment for the Cape Breton Assessment Region, to the market value of $554,000.00 to arrive at an assessed value of $498,600.00 for the subject property for the 1983 assessment year which he rounded to $499,000.00.

Evidence on behalf of the Director of Assessment was given by Robert Gregor, an Assessor since April 1979. Mr. Gregor has a Bachelor of Business Administration Degree from Saint Francis Xavier University. He has completed the three year course on assessment principles and practice sponsored by the Institute of Public Affairs of Dalhousie University and the 4th year Land Economics Course also sponsored by the Institute of Public Affairs. Mr. Gregor has attended six seminars for assessors sponsored by the Department of Municipal Affairs. He prepared the assessment report relating to the subject property filed as Exhibit C-10. At the beginning of the hearing he made several additions to his report which were filed as Exhibits C-11, to C-14 inclusive.

Mr. Gregor calculated the assessed value of the subject property for the 1983 assessment year to be $770,300.00. In arriving at his estimate of market value, Mr. Gregor used the cost method. He estimated the market value of the subject property for the 1983 assessment year as of January 1, 1980 rather than estimating the market value as of December 1982 and then applying the general level of assessment. He used the base date January 1, 1980 in estimating the market value of the subject property for the 1983 assessment because the last general reassessment of properties in the City of Sydney was in the year 1981 and the base year for determining market value for assessment purposes for 1981 was January 1, 1980. The 1981 assessments were carried over as the assessments for 1982 and 1983.

In the opinion of Mr. Gregor, the income method was not an appropriate method to use to determine the market value of the subject property because the property's income was understated as a result of poor management practices. He also said it was difficult to determine a reliable capitalization rate and there was no market data available on rental values of race track properties.

Mr. Gregor said that he attends the races on a regular basis. He has friends who are horse owners and he helps train or jog some of their horses. Mr. Gregor cited the following poor management practices which have the affect of understating the property's income:

(1) cutting back on the purse which discourages the attraction of good competitive horses;

(2) poor promotion;

(3) creating a poor image in the community due to a wildcat strike in 1980 and permitting a climate in which horsemen could manipulate races.

Mr. Gregor calculated the market value of the subject property by the cost method as follows:

Land Value			$306,180.00
Site Improvements:			
Pavement			2,448.00
Fencing			21,372.00
Lighting			3,570.00
Buildings		$743,865.00	
Mobile Home		15,200.00	
		$759,065.00	
Less: Physical Depreciation			
Buildings	$122,204.00		
Mobile Home	7,600.00	$129,804.00	$629,261.00
			$962,831.00
Less: Economic Obsolescence 20%			192,566.00
Property Value			$770,265.00
Rounded to:			$770,300.00

Mr. Gregor used Boeckh's Building Valuation Manual to cost the various buildings and structures. He estimated the reproduction cost for all buildings excluding the mobile home to be $743,865.00. The reproduction cost of the mobile home, which he estimated at $15,200.00 was based on conversations he had with local mobile home dealers.

Mr. Gregor used the age-life method to estimate the amount of physical depreciation in each of the buildings. The amount of physical depreciation calculated by Mr. Gregor was $122,204.00 for all the buildings excluding the mobile home and $7,600.00 for the mobile home.

In determining the land value of the subject property, Mr. Gregor relied upon the sale of a 10.83 acre parcel of land zoned light industrial located on Upper Prince Street in the City of Sydney, approximately one mile from the subject property. Mr. Gregor said that the indicated sales price per acre of this property was $15,400.00. On cross-examination by Counsel for the Appellant and on further examination of the Deed Transfer Tax Affidavit submitted on the transfer of this property, Mr. Gregor revised the indicated sales price of this property to $15,000.00 per acre. Although the sale took place on July 30, 1981, one and one-half years after the effective date for determining the valuation of the subject property, Mr. Gregor stated that light industrial land values had remained constant during the period January 1, 1980 to July 30, 1981.

Mr. Gregor also stated that there were no sales of recreational land in the City of Sydney or surrounding area within the last several years from which to estimate the market value of the subject property. He also stated that there were a number of sales of smaller lots located in the vicinity of the subject property, zoned commercial, which sold in the years 1977 to 1980 at prices ranging from $37,900.00 per acre to

$134,300.00 per acre. Mr. Gregor rejected these sales because they were for small lots and not comparable with the subject property.

Taking into consideration that the sale of the comparable chosen was the sale of a slightly smaller parcel of land than the subject, the time of the sale of the comparable, the sewer easement through the subject site and the zoning of the subject site, Mr. Gregor estimated the market value of the subject land to be $13,500.00 per acre. He calculated the market value of the subject land to be $306,180.00 without site improvements (22.68 acres x $13,500.00).

Mr. Gregor calculated the value of site improvements to be $2,448.00 for paving, $21,372.00 for fencing and $3,570.00 for lighting. The basis for these calculations were not mentioned in the evidence.

At Page 30 of his Assessment Report, Mr. Gregor explained how he arrived at a figure of 20% for economic obsolescence:

> " In reaching a proper assessed value on the Cape Breton Turf Club Limited, reports compiled by various governments and chartered accountants were read as well as consultation with Mr. Blaise Currie to determine if an economic obsolescence existed. We also considered the economic situation of industrial Cape Breton.
>
> It was apparent that such an obsolescence did exist and our opinion was to apply an economic obsolescence of 20% to the subject property."

Mr. Gregor said that the racetrack is capable of running 130 races per year. Since it is only running 104 races a year, it is operating at 80% of capacity. Mr. Gregor said this fact was one of several factors he considered in estimating the amount of economic obsolescence in the subject property. On cross-examination he also stated that Mr. Charles Hopkins, the Regional Director of Assessment, had mentioned the figure of 40% for economic obsolescence in testimony at the Regional Court hearing but only as a way of explaining his method of calculating economic obsolescence and not as an estimate of the rate to apply for economic obsolescence.

Mr. Gregor reviewed the land sales relied upon by Mr. Weatherby in determining the land value for the subject property. He said that only two of the properties selected by Mr. Weatherby, the Mayflower Mall property and another located in the vicinity of the Mayflower Mall property, were physically suitable for a racetrack. Mr. Gregor said that the sale prices of these properties indicated a value per acre only marginally less than his estimate of $13,500.00 per acre. He dismissed the other properties selected by Mr. Weatherby as being unsuitable for establishing a racetrack and therefore not helpful in estimating the land value of the subject property. He also pointed out that all the properties selected by Mr. Weatherby were located in a different municipality than the subject property and therefore were not comparable properties.

Counsel for the Director submits that the subject property sold in 1984 for an imputed purchase price of $2,200,000.00 which is far in excess of the assessed value of the property and therefore an indication that the property is worth more than the

$499,000.00 figure claimed by the Appellant. Counsel argued that the fact that the new owners of the Appellant are willing to pay $2,200,000.00 to the creditors of the Appellant is the same as paying the previous owner $2,200,000.00.

Counsel for the Director also submits that the income of the Appellant used by Turner, Drake in the income method is understated because of poor management and therefore an unreliable indication of the reasonable earning capacity of the property. Therefore he argues that the market value determined by the income method does not accurately reflect the market value of the property.

Counsel for the Director also submits that the cost method used by Turner, Drake provides an unreliable indication of market value for the following reasons:

(1) The land value is too low. Counsel argues that Turner, Drake did not value the subject land but a hypothetical property outside the city of Sydney. He says that the comparables chosen by Turner, Drake are not comparable to the subject but rather to rural land on which a racetrack might be located.

(2) An allowance of 77% for economic obsolescence is excessive. Counsel for the Director argues that management is the major cause of the financial problems of the racetrack and not a decline in the racetrack industry although he acknowledges there has been an economic decline in the harness racing industry. Counsel for the Director argues the method used by Turner, Drake to calculate economic obsolescence is merely the difference between the value determined by the cost method before economic obsolescence and the value determined by the income method and is not a reasonable estimate of the decline in the earning capacity of the racetrack.

The appraisers for the Appellant estimated the market value of the subject property as of December 1, 1982 to be $554,000.00 and after applying the general level of assessment of 90% for 1982, calculated the assessed value of the subject property for 1983 to be $499,000.00. They used the income method and the cost method in arriving at their estimation of the market value of the subject property. The assessor asserts a market value of $770,300.00 as of January 1, 1980 which he also claims is the assessed value of the property for the 1983 assessment year. He used the cost method in arriving at his estimate of market value.

The subject property is an income producing property similar to other income producing properties such as hotels, motels, office buildings, apartment buildings and shopping centres, which are all valued by the income method. It is not similar to special purpose industrial buildings or commercial properties of a service nature which are most often valued by the cost method. In the opinion of the Board, the subject property is a property which lends itself to valuation by the income method.

The Board disagrees with the submission of Counsel for the Director that the income method is not an appropriate method to value the subject property due to the poor performance of the Appellant's management. In the opinion of the Board, management has an effect on the income of all income producing properties whether they be hotels, shopping centres or racetracks. Also, purchasers of these properties generally feel they can do a better job of promoting and operating the property than the previous owner. If a property lends itself to valuation by the income method, the property should be valued by the income method, even if management is not performing well. The assessor should estimate the loss in value due to poor management by reference to market data and if it cannot be estimated he should not take into account poor management in arriving at his estimate of market value of the property. In the opinion of the Board, in this appeal there was no evidence based on market data indicating the income of the subject property would have been substantially higher if not for the management of the Appellant.

Mr. Turner carefully reviewed the income and expense items of the Appellant for the prior six years and arrived at a normalized statement of net income for the 1983 assessment year. The Director did not challenge any of the expense items used by Turner, Drake. The Board has already dealt with the Director's objections regarding the Appellant's income figures used by Turner, Drake.

The Board also accepts the capitalization rate of 15% used by Turner, Drake. This rate was not disputed by the Director. Although Turner, Drake were not able to produce a capitalization rate derived from the sale of racetrack properties, they reviewed generally the capitalization rates for income producing properties and arrived at a reasonable capitalization rate for the subject property. In the absence of more specific information to dispute this rate, the Board accepts the capitalization rate used by Turner, Drake.

The Board attached very little weight to the cost method and the value arrived at by the assessor using the cost method.

The Board also rejects Turner, Drake's use of the cost method and their estimate of land value and economic obsolescence. Although Turner, Drake's estimate of market value by the cost method is the same as their estimate of market value by the income method, this is due entirely to the way they calculated economic obsolescence and for reasons to be given later in this decision the Board rejects Turner, Drake's calculation of economic obsolescence.

The cost method arrives at an estimate of market value for a property by valuing the land and adding the depreciated value of the buildings and site improvements. One of the difficulties in using the cost method is in estimating the amount of depreciation and in particular the amount of functional and/or economic obsolescence. Both parties agree that the subject property has economic obsolescence and both the assessor and the appraiser have accounted for the loss in value of the property due to economic obsolescence. The assessor, Mr. Gregor, applied a rate of 20% for economic obsolescence. This rate was not measured by any reference to market data and in the opinion of the Board, is a completely subjective estimate on Mr. Gregor's part. The Board therefore, doubts the reliability of this estimate. Turner, Drake estimated the amount of economic obsolescence to be $1,420,697.00 which is 77% of the reproduction cost less physical depreciation of the building and site improvements. Turner, Drake measured the amount of economic obsolescence by calculating the rental loss due to economic factors and capitalizing that loss at the appropriate capitalization rate. In order to estimate the rental loss, Turner, Drake calculated the potential rental income of the property and its actual rental income and subtracted the actual rental income from the potential rental income (see Page 15 of this decision). It becomes apparent that the reliability of the potential rental income of the subject property determined by Turner, Drake depends upon the accuracy of their estimates of land value and depreciated building value. If the land value or the depreciated building value is not accurate then the potential rental income of the property is not accurate and the measurement of the amount of economic obsolescence is not accurate. It is also obvious that the rate to be applied for economic obsolescence varies with the value of the land or the depreciated value of the buildings.

A second problem with the cost method in this appeal is the difficulty in arriving at a reliable market value for the land component of the subject property.

Mr. Weatherby and Mr. Gregor were far apart in their estimate of the market value of the subject land. (Mr. Weatherby's estimate of market value was $123,000.00 while Mr. Gregor estimate was $306,180.00). The market value of the land was very difficult to estimate in this instance due to the lack of sales of similar properties from which appropriate values could be derived. Both Mr. Weatherby and Mr. Gregor looked to sales of other properties of varying sizes, uses, zoning and locations in an attempt to estimate the market value of the subject land. Mr. Weatherby relied upon land sales located in the municipality of the County of Cape Breton, some of which were not large enough or not suitable for the establishment of a racetrack. Mr. Gregor relied upon the sale of an industrial zoned property in close proximity to the subject property while the zoning of the subject property is recreational and its use is non-conforming commercial. The Board is not satisfied that the land value determined by either Mr. Weatherby or Mr. Gregor is a sufficiently reliable indication of the market value of the subject land and therefore gives very little weight to their estimates of land value.

In a written submission filed with the Board after the conclusion of the hearing, Counsel for the Appellant made the very serious suggestion that the assessor deliberately misled the Board in giving evidence on the sale price per acre of the "McGuire" property relied upon by the assessor to estimate the land value of the subject property. In the opinion of the Board, Counsel for the Appellant was incorrect and ill-advised in making this suggestion. The Board agrees with Counsel for the Director that the error made by the assessor was fully explainable due to the filing of two Deed Transfer Tax Affidavits which had various alterations and obliterations.

A third concern with the assessor's estimate of market value by the cost method is the accuracy of his calculations of the reproduction costs of the various buildings on the site. Mr. Gregor calculated the reproduction cost of all the buildings to be $759,065.00 while Turner, Drake calculated the reproduction cost of the same buildings at $2,365,156.00. The largest building on the site is the grandstand building which was built in 1975 at a cost of $774,538.00. Mr. Gregor estimated the reproduction cost of this building at January 1, 1980 to be $565,516.00 which is substantially less than the actual construction cost five years earlier. The Board is not satisfied that the assessor arrived at an accurate calculation of the reproduction cost of the various buildings.

The Board rejects the argument of Counsel for the Director that the market value of the property for purposes of the 1983 assessment is greater than $499,000.00 because the property sold in 1984 for $2,200,000.00. The Board is not satisfied that the evidence indicates that the property actually sold for $2,200,000.00 in 1984. Also the sale was almost 18 months subsequent to the effective date for determining the market value of the subject property for the 1983 assessment.

The Board is of the opinion that the income method is an appropriate method to value racetrack properties and in the present appeal the market data supporting the value arrived at by the income method is more accurate and reliable than the market data supporting a value arrived at by the cost method.

The Board therefore accepts the evidence of Turner, Drake and the Appellant that the market value of the subject property for purposes of the 1983 assessment is $554,000.00 and after applying the level of the roll of 90% determines the assessed value of the subject property for 1983 to be $499,000.00. The Assessment of $499,000.00 includes a value for the mobile home which was classified residential by the Director and a value for the remainder of the property which was classified commercial.

Both Turner, Drake and Mr. Gregor estimated the market value of the mobile home at approximately $8,000.00. The Board therefore sets the commercial assessment of the property at $491,000.00 and the residential assessment of the property at $8,000.00.

There remains the calculation of the amount of the Appellant's business occupancy assessment for 1983 which was initially set by the Assessor at $222,500.00. This figure was confirmed by the Regional Assessment Appeal Court. The Appellant's business occupancy assessment relates only to part of the racetrack property. It does not relate to either the residential portion of the property (the mobile home) or the infield and track area which was assessed for business occupancy assessment purposes to the Cape Breton Horsemen's Association which in turn was exempted from business occupancy assessment as a sporting organization pursuant to Section 25B(1) of the Assessment Act which reads as follows:

> "25B(1) Persons occupying property for the purposes of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution shall not be assessed for a business occupancy assessment."

The assessor now wishes to assess the Appellant for business occupancy for the infield and track areas because he cannot find the lease from the Appellant to the Cape Breton Horsemen's Association giving possession of these areas to the Horsemen's Association.

The only business occupancy assessment before the Board in this appeal is the Appellant's business occupancy assessment which does not include the infield and track area. The exemption of the

Cape Breton Horsemen's Association and whether they occupy the infield and track area has not been appealed and the Board is not willing to make inquires into the validity of their assessment especially since it was the assessor who originally determined that the Cape Breton Horsemen's Association occupied the infield and track area and not the Appellant when determining the 1983 business occupancy assessment for the racetrack.

The Director maintains that the Appellant's business occupancy assessment should be one-half of the commercial assessment of the entire property. For the reasons already stated, the Board disagrees with that submission.

Mr. Turner calculated the Appellant's business occupancy assessment in relation to the assessed value of the property occupied by the Appellant for business occupancy assessment purposes (that is, the entire property excluding the infield and track area which were occupied by the Cape Breton Horsemen's Association).

Mr. Turner used the following formula to determine the Appellant's business occupancy assessment:

$$\frac{\text{Land Value + Depreciated Cost of Commercial Property Occupied by Appellant}}{\text{Land Value + Depreciated Cost of Entire Commercial Property}} \text{ X } \text{Commercial Assessment of Property} \text{ X } \text{Applicable \% under Section 7(2) of Assessment Act} = \text{Business Occupancy Assessment}$$

Using this formula, which was the only one before the Board for determining the assessed value of the property occupied by the Appellant for business occupancy assessment purposes, the Board calculates the Appellant's 1983 business occupancy assessment to be $230,100.00 as follows:

$$\frac{\$1,843,014}{\$1,966,480} \times \$491,000 \times 50\% = \$230,086.00$$

Rounded to: $230,100.00

Mr. Turner actually calculated the Appellant's business occupancy assessment to be $233,000.00. The Board's calculation of $230,100.00 for business occupancy assessment differed from Mr. Turner's calculation of $233,000.00 because Mr. Turner apportioned the assessed value of the entire property ($499,000.00) which included a value for the mobile home, whereas the Board only apportioned the commercial assessment ($491,000.00) of the subject property.

In the result the Board allows the appeal of the Appellant and determines the Appellant's 1983 assessment as follows:

Residential	$ 8,000.00
Commercial	$491,000.00
Business Occupancy Assessment	$230,100.00

The Appellant shall be entitled to its costs to be taxed on a party and party basis on the County Court scale.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of September, A.D., 1985.

Darryl Wilson

DARRYL W. WILSON

Director of Assessment v. Chipman

ASSESSMENT--CHANGE OF USE--SERVICE OF NOTICE OF APPEAL ON ONE OF THREE ASSESSED OWNERS--LACK OF JURISDICTION--ASSESSMENT ACT, SS.23, 31, 33, 100(1),(3)--INTERPRETATION ACT, S.18(i)

This is an appeal by the Director of Assessment from a decision of the Annapolis-Digby Regional Assessment Appeal Court allowing an appeal by F.M.C. respecting the imposition of a change-of-use tax. The subject land is jointly owned by, and assessed to, F.M.C. and two other persons. The Director served his Notice of Appeal on F.M.C. and not on the other two assessed owners.

HELD: The appeal is dismissed with costs to F.M.C. to be taxed on party and party basis under the County Court scale.

Section 100(3) of the Assessment Act requires the Director to serve a copy of the Notice of Appeal on the person or persons in whose name the property is assessed. This service is mandatory. The Board does not have before it any evidence to indicate F.M.C. is the agent for the other two property owners. The Board must therefore assume that he is not such an agent. Nor is there evidence to bring the case within s.33(4). The Board declines to assume jurisdiction.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by **THE DIRECTOR OF ASSESSMENT** from the decision of the Regional Assessment Appeal Court, Annapolis-Digby Region respecting property of **FRANK MILES CHIPMAN,**

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: RANDALL DUPLAK, LL.B., for the Director of Assessment, Appellant;

GORDON TIDMAN, Q.C., for Frank Miles Chipman, Respondent.

DECISION

This is an appeal pursuant to s.s.(3) of Section 100 of the Assessment Act, R.S.N.S. 1967, c. 14 by the **DIRECTOR OF ASSESSMENT** from the decision of Eric Sturk, the Vice-Chairman of the Regional Assessment Appeal Court, Annapolis-Digby Region, made February 6, 1985, allowing the appeal of **FRANK MILES CHIPMAN** respecting the imposition of a change-of-use tax relating to 39.8256 acres of land situate at Waterloo Lake, Annapolis County jointly owned by three persons, Frank Miles Chipman, Muriel Lucenti and Milene Wingrove and assessed in their names.

It would appear from representations made by Counsel for the Director that notice of the change-in-use tax was given to all three owners but only Frank M. Chipman appealed to the Regional Court.

At the commencement of the hearing before the Board held in the Council Chambers of the Municipality of the County of Annapolis in Annapolis Royal on May 30, 1985, Counsel for Frank M. Chipman argued that the Board lacked jurisdiction to hear the appeal on the merits because the Appellant, the Director of Assessment, had served only one of the three owners of the subject property, namely Mr. Chipman, with a Notice of Appeal contrary to the provisions of s.s.(3) of Section 100 of the Assessment Act.

Counsel for the Director agreed with Counsel for Mr. Chipman that Mr. Chipman was the only one of the three assessed owners who had been served with the Notice but argued that Mr. Chipman had been served as agent for the other owners.

Counsel for Mr. Chipman, when questioned by the Board on whether or not it is necessary to serve all of the assessed owners, referred to s.s. (3) of Section 100 of the Assessment Act, R.S.N.S., 1967, c. 14, as amended, which reads as follows:

> "The Director may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the person in whose name the property is assessed, the person who appealed the assessment if he is not that person, the recorder and the clerk of the municipality or town in which the property is situate, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board."

He pointed out that the Director in appealing pursuant to s.s. (3) must serve the Notice of Appeal "on the person in whose name the property is assessed." He then referred to Section 23 of the Assessment Act which requires the Director to prepare the assessment roll in which "shall be set down (a) the location and a concise description of each separate piece of assessable property, with the name and address of the owner thereof;...". He then referred the Board to the provisions of Section 31 of the Assessment Act which reads as follows:

> "Whenever two or more persons are, either as business partners, joint tenants, tenants-in-common or by any other kind of joint interest, the owners of any property, the names of each of them, or of so many of them as can be ascertained by diligent inquiry, shall be entered on the assessment roll and the assessment may be apportioned among them to the best of the assessor's judgement or the property may be assessed as a unit to all of the owners known to the assessor."

He then referred the Board to the provisions of Section 18(i) of the Interpretation Act, R.S.N.S., 1967, c. 151, which states that "In an enactment, (i) words in the singular include the plural, and words in the plural include the singular." He then argued that the word "person" in the phrase "on the person in whose name the property is assessed" contained in s.s.(3) of Section 100 of the Assessment Act means "persons" and the Director is therefore obliged to serve the Notice of Appeal on all of the assessed owners.

Counsel for Mr. Chipman also argued that there is no evidence before the Board to show that Mr. Chipman is the agent of his two co-owners for purposes of being served with a Notice of Appeal under the Assessment Act. He contends that Section 100 s.s. (3) of the Assessment Act was not complied with and therefore the Board does not have jurisdiction to hear the appeal. He pointed out that a decision of the Board could affect all three owners and not just Mr. Chipman and therefore it is necessary that all the owners be served with a copy of the Notice of Hearing. Each of the three owners was given Notice of the imposition of the change-in-use tax.

Counsel for the Director submits that if the Board should decide that Mr. Chipman was not the agent for the other two owners then "two-thirds of the property in question is not under appeal and has accepted the change-in-use and only a third may be open to dispute." Counsel for the Director also submitted that on his interpretation of Section 100 s.s. (3), of the Assessment Act, the Director need only serve the Notice of Appeal on the "person who appealed the assessment" if the Appellant is not the person "in whose name the property is assessed" and therefore service of the Notice on Mr. Chipman was all that was required.

Counsel for Mr. Chipman submits that Section 100 s.s. (3) requires the Director to serve not only the person or persons in whose name the property is assessed but also the person who appealed the assessment if "he is not that person".

Counsel for the Director advised the Board that the Director's file indicated that copies of the Notice of Hearing before the Regional Court were sent to all three owners but a copy of the Regional Court's decision was sent only to Mr. Chipman who was the only Appellant before the Regional Court.

The Board gave Counsel for the Director the opportunity to call evidence in support of his submission that Mr. Chipman was in fact the agent for the other two owners. Counsel for the Director did not choose to call evidence in this regard.

There were seven exhibits filed with the Board as follows:

A-1	Original Notice of Appeal;
A-2	Original appraisal report prepared by R.J. Flanigan, Assessor;
A-3	Photocopy of the decision of the Regional Assessment Appeal Court dated February 6, 1985;
A-4	Affidavit of Murray E. Harris, Regional Director of Assessment that he served Mrs. Beverly Hannan with a true copy of the Notice of Apeal on March 12, 1985;
A-5	Affidavit of Robert J. Flanigan that he served Frank Miles Chipman with a true copy of the Notice of Appeal on March 13, 1985;
A-6	Affidavit of Murray E. Harris that he served Ronald Grant (the Clerk of the Municipality of the County of Annapolis) with a true copy of the Notice of Appeal on March 12, 1985;
A-7	Photocopy of an Affidavit of Heather Cochrane (the Recorder of the Regional Assessment Appeal Court) that she served Sharon Prizeman (Secretary to the Chairman of the Municipal Board) with a true copy of the Notice of Appeal on March 11, 1985.

It is to be noted that the Regional Assessment Appeal Court's decision (Exhibit A-3) does not state whether the appeal from the imposition of a change-in-use tax was allowed or dismissed. Presumably the Director considered that the appeal by Mr. Chipman was successful otherwise he would not have appealed. The Board therefore presumes that the appeal to the Regional Court was successful and the Regional Court intended to confirm the change-in-use tax. It is noteworthy that Mr. Robert J. Flanigan, the Assessor in his report filed as Exhibit A-2 in referring to the decision of the Regional Court states that "upon reading the decision it was not at all clear as to whether the assessment had been confirmed or deleted. Mr. Murray Harris, Regional Director of Assessment for the Annapolis-Digby Region called Eric Sturk by telephone to find out that it had been Mr. Sturk's intention to have the assessment deleted.....".

In the opinion of the Board, it is clear that s.s. (3) of Section 100 of the Assessment Act requires the Director when appealing a decision of the Regional Assessment Appeal Court to serve a copy of the Notice of Appeal within the thirty-day appeal period on the person or persons in whose name the property is assessed. Service of the Notice of Appeal on the person or persons in whose name the property is assessed by the Director is mandatory. In this case the Director admits that he only served one of the assessed owners albeit he is also the person who originally appealed the assessment.

The Board has made numerous decisions in which on the application of the Director it has declined to assume jurisdiction in cases where an appeal is made under Section 100, s.s. (1) of the Assessment Act and the Appellant has failed to serve one or more persons upon whom service is required under s.s. (1).

The Board does not have before it any evidence to indicate that Frank Miles Chipman is the agent for the other two property owners and the Board must therefore assume that he is not the agent for the other two owners.

Section 33(1) of the Assessment Act provides for an assessment to be made in the name of an agent where property is under the control of the agent. S.S. (4) of Section 33 provides that "If there is more than one person exercising control, it shall not be necessary to serve all of them with notice of assessment or of rating or of any other notice required to be given by this Act, but notice given to any one of them shall be deemed to be notice given to all of them." Since no agency has been established or proven and there was no evidence that there was more than one person exercising control s.s.(4) of Section 33 does not assist the Director in this case.

The Board declines to assume jurisdiction to hear the appeal on the merits because of the failure of the Director to serve the persons in whose name the property is assessed contrary to the provisions of s.s. (3) of Section 100 of the Assessment Act.

The Appeal is therefore dismissed with costs to Frank Miles Chipman to be taxed on a party and party basis under the County Court scale.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of October, A.D., 1985.

R.H. Blois

R.H. BLOIS, Q.C.,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Seabase Canso Offshore Services Ltd. v. Director of Assessment

ASSESSMENT--COMMERCIAL--MARKET VALUE--COST APPROACH--RELEVANCE OF STAGNANT ECONOMY AND OFFER TO PURCHASE--ASSESSMENT ACT, SS. 100(1)

This is an appeal by Seabase from a decision of the Antigonish/Guysborough Regional Appeal Court which confirmed the 1984 commercial assessment of the Appellant's property on Main St. in the Town of Mulgrave at $147,000.00. The land is leased from the C.N.R. for $1,100.00 per year. The Appellant erected a single storey, 60 ft. by 150 ft. building on the site and leases the space to two other companies. The building was listed for sale on Sept.1, 1985 for $150,000.00 and an offer of $65,000.00 was received.

HELD: The Board allows the appeal and awards the Appellant costs of $150.00.

The sole issue in this appeal is the determination of the assessed value of the Appellant's property for the 1984 assessment year. The assessor stated that she made an error in costing the electrical component of the subject building and therefore the market value should have been $122,800.00. The Board agrees with the Director's submission that the Appellant did not adduce any evidence of market value for the subject property as of Jan.1, 1983, the effective date for determining market value for the 1984 assessment year. The Board appreciates the Appellant's concern that while the economy in the Mulgrave area may have been stagnant during the 1981-1984 period, its assessment has increased 50%. However, in the absence of market data to support a valuation by the comparative sales method or income method, the Board must rely on the market value determined by the cost method. The offer to purchase the property is not a true indication of market value because the offer was received

2½ years after the effective date for determining market value and because the property had not been exposed to the market for a sufficiently long period. The Board is satisfied the assessor took into account all relevant facts when valuing the Appellant's property and accepts her evidence that $122,800.00 is the assessed value for 1984. The business occupancy tax of the lessees is accordingly adjusted.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act R.S.N.S. 1967 c.14 as amended;

- and -

IN THE MATTER OF: An Appeal by Seabase Canso Offshore Services Limited from the decision of the Regional Assessment Appeal Court, Antigonish/Guysborough Assessment Region respecting the 1984 commercial assessment of its property in the Town of Mulgrave, Guysborough County.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: JOSEPH CAMERON, LL.B., for the Appellant;

WILLIAM WILSON, LL.B., for the Director of Assessment

DECISION

This is an appeal pursuant to Subsection 100(1) of the Assessment Act, R.S.N.S. 1967 ch.14 as amended, by Seabase Canso Offshore Services Limited hereinafter referred to as Seabase, from the decision of the Regional Assessment Appeal Court, Antigonish/Guysborough Assessment Region, made March 28, 1984 which confirmed the commercial assessment of the Appellant's property located on Main Street in the Town of Mulgrave for the 1984 assessment year at $147,000.00.

Seabase leases two-thirds of the property to Atlantic Combustion Products Limited and one-third of the property to

Technifluids Limited. Atlantic Combustion Products is assessed for business occupancy assessment purposes for two-thirds of the property and Technifluids Limited is assessed for business occupancy purposes for one-third of the property.

The Appellant's Notice of Appeal is dated May 17, 1984 and it was received by the Board on May 23, 1984. The appeal had been set down for a hearing on two other occasions but it was adjourned on each occasion. First, due to the illness of the owner of the Appellant and second, due to the illness of the assessor. The appeal was heard by the Board on October 1, 1985, in the Council Chambers in the Town of Mulgrave.

There were no objections to the Board's jurisdiction to hear the appeal and the Board proceeded to hear the appeal on its merits.

The grounds of appeal set out in the Notice of Appeal filed as Exhibit S-1 are as follows:

> "1. The present assessment is almost 2½ times the actual cost of the building.
>
> 2. It is entirely inconsistent with the assessment of other buildings in the town.
>
> 3. The building is not a steel building, as was stated by the assessor at the appeal court. This building is of wood structure and is steel clad.
>
> 4. While it was agreed that only one-third (1/3) of the building is insulated; it houses no rooms, no office space and no partitions; with the exception of one (1) six feet by eight feet (6' x 8') washroom and toilet facility.
>
> 5. In the above-mentioned section, a locally constructed incinerator-stove is the building's only heating system."

The Seabase property consists of 75,000 square feet of land located on Main Street in the Town of Mulgrave, approximately 500' from the waters of the Strait of Canso. The lot is leased from the Canadian National Railway at a rate of $1,100.00 per year. The site is rectangular in shape and measures 750' on its west and east boundaries and 100' on its north and south boundaries. It is bounded on the west by Main Street in the Town of Mulgrave, on the east by the C.N.R. Rail Line, and on the north and south by undeveloped lands leased by the C.N.R. to either the Town of Mulgrave or the Mulgrave Industrial Commission.

The topography of the site is flat. The site is serviced by the Town's water system and contains an on-site septic system. The C.N.R. has a rail line to the site which is zoned Industrial.

The area in which the site is located is along the Strait of Canso approximately four miles from Highway 101, a main Provincial highway and approximately one mile from the Mulgrave Wharf, a large wharf facility on the Strait of Canso.

Located on the site is a single storey building, rectangular in shape, measuring 60' x 150'. The building is used as an industrial warehouse. The building does not have a basement. The floor of the building consists of a 6" concrete slab on 4" of gravel. The exterior walls are steel siding on 2 x 6 studding and 1/2" plywood. The walls and ceiling in 1/3 of the building are insulated. A partition separates the insulated part of the building from the main uninsulated part. The building does not contain office space. A small enclosed area of the building (approximately 6' x 8') is used as a washroom. It contains a sink, toilet, shower and a 12 gallon electric water heater. There is a home-made boiler type incinerator in the insulated part of the building. The incinerator is used to burn bags which provide a small amount of heat. There is no heating in that portion of the building which is not insulated. The building has incandescent lighting.

The only witnesses called to give evidence were William Digdon and the assessor who assessed the subject property for the 1984 assessment year, Joyce Viau.

Mr. William Digdon, a resident of Amherst, is the President and majority shareholder of Seabase. He is also the President and majority shareholder of Atlantic Combustion Products Limited, a tenant in the subject building. He said that the subject building was constructed in 1980 at a contract price of $48,000.00. The contract price did not include the cost of wiring the building or the cost to insulate part of the building. Mr. Digdon said the Appellant purchased the wiring materials itself and had it installed by a local contractor. The Appellant also bought the insulation which was installed by its employees. He did not provide the Board with the material and installation costs of these items. Mr. Digdon also said the Appellant installed its own septic system and a make-shift boiler. According to Mr. Digdon, there have not been any improvements or changes to the building since it was constructed in 1980.

In the opinion of Mr. Digdon, the figure of $147,000.00 placed on the property by the assessor as its market value is too high. He said that the building was built in 1980 with the hope of "cashing in on the offshore business" but the expected increase in business in the Mulgrave area did not materialize. According to Mr. Digdon, there has not been a new building constructed in Mulgrave during the years 1983, 1984 or 1985.

Mr. Digdon said that the Seabase building is hard to rent. He said that Technifluids Ltd., one of the tenants in the subject building in 1984, terminated its lease during 1985 and moved its operations to Halifax. He said that the subject building competes for tenants with an industrial warehouse building owned by the Mulgrave Industrial Commission. According to Mr. Digdon, the Industrial Commission property is in a better location than the subject property and has a paved parking lot whereas the subject property has very little paving.

Mr. Digdon said that Seabase listed the building for sale with a local real estate agency on September 1, 1985. The listing price for the building only is $150,000.00. Between the date of the listing and the date of the hearing, Mr. Digdon said that Seabase received an offer to purchase the building for $65,000.00.

Mr. Digdon said that he has approached the Mulgrave Industrial Commission and the Strait of Canso Industrial Development Authority about buying the building but neither agency was interested in purchasing it. Mr. Digdon said that Seabase did not attempt to sell the building during 1984.

Mr. Digdon stated that the assessment of the subject property was increased from $78,500.00 in 1983 to $147,000.00 in 1984. The assessment of $78,500.00 was also the assessment in the years 1981 and 1982. During the period from 1981 to 1984 there were no changes to the building and there was no growth in the economy of the Mulgrave area.

Mr. Digdon referred to the 1984 assessment of $160,000.00 for the Mulgrave Marine property which consists of land, three buildings, a storage shed and a mobile home. He said that one of the Mulgrave Marine buildings is a Butler type building which is a much better building than the subject building. According to Mr. Digdon, the 1984 assessment of the subject building is too high when compared with the assessment of the Mulgrave Marine property.

Evidence on behalf of the Director was given by Joyce Viau, N.S.I.A., an assessor since 1974, who resides at West River, Antigonish County. She prepared the assessment report relating to the subject property which was filed as Exhibit S-4. She was the person who assessed the subject property at $147,000.00 for the 1984 assessment year. She also assessed the subject property each year since the building was constructed in 1980. Ms. Viau was qualified as an expert to give an opinion on the market value of the subject property for assessment purposes for the 1984 assessment year.

Ms. Viau's report concluded with the statement that "It is the opinion of the undersigned that the market value of the subject property, as of January 1, 1983 is $122,800.00". She said that the original assessment of $147,000.00 was overstated due to an error she made in costing the electrical component of the subject building.

In arriving at her estimate of market value, Ms. Viau used the cost approach. She did not use the income method to value the subject property because there was insufficient market data on rents to determine a net income for the property or on sales of similar or comparable properties to determine an appropriate capitalization rate.

She did not use a direct sales comparison method because she could not find any properties comparable to the subject which had recently sold in either Mulgrave, Port Hawkesbury or the Municipality of the County of Guysborough. Ms. Viau stated that there was a forced sale of a 4,000 square foot industrial warehouse located in the Mulgrave Industrial Park. This building was constructed in 1982 at a cost of $147,000.00 and sold on a liquidation sale for $87,000.00. She did not consider this building to be comparable to the subject building and she did not consider the sale to be a sufficiently reliable sale since it was conducted at a Sheriff's sale. The cost approach utilized by the assessor consists of the following steps:

(1) Estimating the land value;

(2) Estimating the current cost of reproducing the building;

(3) Estimating depreciation from all causes and deducting the amount of depreciation estimated from the reproduction cost of the building,

(4) Adding the land value and the depreciated value of the building.

Prior to estimating the market value of the subject property for purposes of this hearing, Ms. Viau inspected the property on four occasions, questioned Mr. Digdon about the specifics of the building's construction and made actual measurements of various building components. She said that she was satisfied that the information that she gathered on the building's construction for this hearing was complete and accurate.

In determining the land value of the subject property, Ms. Viau considered the sales of four other properties zoned Industrial located in the Town of Port Hawkesbury. She said that there were no sales of industrial land in the Town of Mulgrave to assist her in determining the land value of the subject property. She also stated that the lease from C.N.R. to Seabase was not of any help in determining the market value of the land. Ms. Viau's analysis of industrial land sales in Port Hawkesbury indicated a market value of 25¢ per square foot for developed industrial land and 15¢ per square foot for undeveloped industrial land. Since the subject property was only serviced by water and the Appellant had to install its own septic system, she valued the subject land at 20¢ per square foot. She calculated the land value to be $15,000.00 (75,000 sq.ft. x 20¢ per square foot).

Ms. Viau used Boeckh's Valuation Day Manual as a guide in determining the reproduction cost of the building. She updated the costs shown in the Boeckh's Manual prepared in 1971 by means of a costing index supplied by Boeckh's. She said that she was familiar with local building costs and she checked the reasonableness of the cost figures indicated by the Manual by reviewing any costs she considered unreasonable with local suppliers and contractors. By this procedure, she arrived at a reproduction cost of the building as of January 1, 1983, the effective date for determining the market value of the subject property for the 1984 assessment year, in the amount of $115,929.10.

She then applied a rate of 7% for physical depreciation to the reproduction cost of the building. This resulted in a depreciated reproduction cost of the building of $107,814.06 which she rounded to $107,800.00. Adding the land value of $15,000.00 to the depreciated building value of $107,800.00 she arrived at $122,800.00 as the estimated market value of the subject property by the cost method.

She did not make any allowance for functional obsolescence because the building did not show any signs of functional obsolescence. She did not make any allowance for economic obsolescence because they was no market data from which to determine an obsolescence factor.

Ms. Viau said that she assessed the Mulgrave Machine Works property referred to by Mr. Digdon and she does not consider that property to be a comparable or a similar property to the subject property. She said that the Mulgrave Marine Works property has a different use than the subject property. Also she said there is a large amount (35%) of functional obsolescence in the Mulgrave Marine Works buildings while the subject building does not have any functional obsolescence.

She also said that she did not consider the contract price of $48,000.00 to construct the subject building in 1980 to be conclusive of the market value of the property as of January 1, 1983 because this amount did not include all the costs to construct the building. Further, she said, that the contract price of $48,000.00 was not the market value of the building on January 1, 1983 the effective date for valuing the property for the 1984 assessment year because construction costs had risen since the building was constructed. Finally, in her opinion, the cost of $12.77 per square foot determined by her as the reproduction cost per square foot of the subject building as of January 1, 1983 was reasonable in light of her knowledge of local construction costs.

Counsel for the Appellant submits that the figure of $122,800.00 is an unrealistic valuation of the subject property for the 1984 assessment year. He argues that the market value of the subject property did not increase from $78,500.00 (the market value of the property for the 1981 assessment year). to $122,800.00 in three years because there was no growth in the Mulgrave area during this time. He also points out that the Appellant received an offer to buy the property in 1985 as a price of only $65,000.00. Finally, he argues that the assessment of the subject property is too high because it is only $37,000.00 less than the assessment of the Mulgrave Marine Works property and the latter property is a much larger property with better buildings than the subject property.

Counsel for the Appellant submits that the 1984 Assessment should be closer to the 1981 assessment of $78,500.00.

Counsel for the Director submits that the burden is on the Appellant to show the assessor erred in setting the 1984 assessment. He argues the only evidence of market value of the subject property was the evidence given by the assessor. He submits that the Appellant did not adduce any evidence relating to the market value of the subject property or industrial properties generally. He submits that neither the assessor's method of valuation nor her calculations were challenged by the Appellant.

Counsel for the Director submits that one offer to buy the property for $65,000.00 in September 1985 is not a true indication of the property's market value because the property had not been exposed to the market for a very long period when the offer was received. Also the Appellant has not accepted the offer and still has the building listed for sale at $150,000.00.

Counsel for the Director also submits that the Appellant's argument that the increase in the 1984 assessment from the previous year's assessment was too high is not valid because there was an increase in construction costs during this period and an increase in value was to be expected because of the increased cost of construction.

Counsel for the Appellant further submits that the cost method is the most appropriate method to value the subject property because of the lack of sales of comparable properties. He argues that the Mulgrave Marine Works property, which did not sell recently, is not a comparable property and the sale of a warehouse building in the Mulgrave Industrial Park was a liquidation sale of a much smaller building which in any event was not comparable to the subject property.

Counsel for the Director submits that the assessed value of the property for 1984 should be $122,800.00.

The sole issue in this appeal is the determination of the assessed value of the Appellant's property for the 1984 assessment year.

The Board agrees with the submission of Counsel for the Director that the Appellant did not adduce any evidence of market value for the subject property as of January 1, 1983, the effective date for determining the market value of the subject property for the 1984 assessment year.

The Appellant's argument that the market value of the subject property for the 1984 assessment year should be the same as the market value of the subject property for the 1981 assessment year ($78,000.00) because the economy of the Mulgrave area did not grow during this period, by itself, is not a valid reason to set the market value of the subject property for the 1984 assessment year at $78,500.00. The Board appreciates the Appellant's concern that while the economy in the Mulgrave area may have been stagnant during the period of 1981-1984, the market value of its property for assessment purposes was increased 50% by the Director of Assessment. The fact that no properties of this type sold during the years 1981 to 1984 lends support to the conclusion that the economy of the Town was not growing. However, in the absence of market data to support a valuation by the comparative sales method or income method, the Board must rely on the market value determined by the cost method.

The Board also agrees with the submission of Counsel for the Director that the offer to purchase the subject building in September 1985, for $65,000.00 is not a true indication of the market value of the subject property for the 1984 assessment year because the offer was received 2½ years after the effective date for determining the market value of the subject property. Also the property had not been exposed to the market for a sufficiently long period.

The Board accepts the evidence of the assessor, Ms. Viau, that the sum of $122,800.00 is the assessed value of the subject property for the 1984 assessment year. Neither the assessor's method or calculations were challenged by the Appellant and her evidence of market value is the only evidence of market value before the Board. In accepting the evidence of the assessor the Board is satisfied that she took into account all relevant facts when valuing the Appellant's property. The Board therefore determine the assessed value of the Appellant's property for the 1984 assessment year to be $122,800.00.

The assessed value of the space occupied by Atlantic Combustion Products Limited is 2/3 of $122,800.00 or $81,866.00 and the assessed value of the space occupied by Technifluids Ltd., is 1/3 of $122,800.00 or $40,934.00. The Board determines the 1984 business occupancy assessment of Atlantic Combustion Products Ltd. to be $40,933.00 rounded to $40,900.00 and the 1984 business occupancy assessment of Technifluids Ltd. to be $20,467.00 rounded to $20,500.00.

Although the Board did not accept the evidence of the Appellant, the Appellant was successful in having its 1984 assessment reduced by approximately $24,000.00 or 16% of its initial 1984 assessment. This was due to an error in the initial assessment by the assessor. The Board therefore allows the appeal and awards the Appellant costs of $150.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of October, 1985.

Darryl Wilson

DARRYL W. WILSON

Ehler v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--COST APPROACH--MARKET DATA APPROACH--UNIFORMITY OF ASSESSMENT--ASSESSMENT ACT, S.38, 100(1)

This is an appeal from a decision of the Inverness, Richmond, Victoria Regional Assessment Appeal Court which confirmed the 1985 residential assessment of the Appellant's property on Queen St. in the Town of Port Hawkesbury in the amount of $44,900.00. The 1985 assessment had originally been in the amount of $48,300.00 and was reduced by the Director prior to the hearing before the Regional Assessment Appeal Court to $44,900.00. The land was purchased by the Appellant and his wife in 1973. They erected a "Kent Home" on it for a total price, land and dwelling, of $20,000.00. The Appellant claimed that the assessment of his property was not uniform with other properties in the area. The Appellant referred to seven properties in his neighbourhood and to the assessments for each.

HELD: The appeal is dismissed without costs.

The Appellant is not an expert in the matter of evaluating real estate. He is strongly of the opinion that his property is assessed at 100% of its market value and other properties in his neighbourhood are assessed at less than market value. If the Appellant had been able to prove that the percentage of his property's assessment to the market value of his property was higher than the general level of assessment of residential and resource property in the municipality, the Board would have been obliged to reduce his assessment to the general level so as to accord with s.38(1) of the Assessment Act. The Board accepts the evidence of the assessor that the general level of assessment in the Town was 101%. The fact that some properties in the Appellant's neighbourhood are assessed at a lower percentage of market value than the Appellant's property is not in itself grounds for reducing the Appellant's assessment. The Appellant has not discharged the onus on him of showing that the assessment of his property was too high because of a lack of uniformity of assessment.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, c. 14, as amended;

- and -

IN THE MATTER OF: An Appeal by **ANGUS EHLER** from the decision of the Regional Assessment Appeal Court, Inverness, Richmond, Victoria Assessment Region, respecting the assessment of residential property situate at 811 Queen Street in the Town of Port Hawkesbury.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: ANGUS EHLER, the Appellant appeared without Counsel;

RANDALL R. DUPLAK, LL.B, for the Director of Assessment.

DECISION

This is an appeal pursuant to Section 100, s.s. (1) of the Assessment Act, 1967, R.S.N.S., c. 14, by **ANGUS EHLER**, who along with his Wife, **EILEEN** are the assessed owners of residential property known as Civic No. 811 Queen Street in the Town of Port Hawkesbury. The Appeal is from the decision of the Vice-Chairman of the Regional Assessment Appeal Court, Inverness, Richmond, Victoria Region made on May 2, 1985, which confirmed the assessment of the Appellant's property for the assessment year 1985 in the amount of $44,900.00.

The Appellant's Notice of Appeal is dated May 27, 1985, and was received by the Board on May 28, 1985, and was filed as Exhibit E-1. The grounds of the Appeal as stated in the Notice of Appeal are that "I feel the assessment is unfair and not uniform to other properties in my area".

The appeal was heard by the Board in the Conference Room of the Municipal Building of the Town of Port Hawkesbury, MacSween Street, on July 31, 1985.

At the commencement of the hearing Counsel for the Director of Assessment (hereinafter referred to as the Director) agreed that the appeal was properly before the Board and that proper notice of the hearing had been given. The Board being satisfied that all preliminary requirements of the Assessment Act had been carried out assumed jurisdiction and proceeded to hear the appeal on the merits.

The subject property had originally been assessed for the 1985 assessment year in the amount of $48,300.00 which was subsequently reduced by the Director to $44,900.00 pursuant to the provisions of s.s.(3) of Section 84 of the Assessment Act.

Before hearing any evidence, the Board requested the Appellant and Counsel for the Director to make opening statements outlining their respective positions. The Appellant stated that his appeal was based on the question of lack of uniformity. He stated that his property was "not uniform to other properties in my area. It is not that it is overassessed or underassessed or anything, I am not arguing that point. I am arguing that it is not uniform to other properties in my area".

Counsel for the Director stated he would be calling evidence from the assessor to establish the assessed value of the property based on two approaches, the cost and market approaches, and would argue that the value by the market approach should apply.

The Appellant testified on his own behalf. He and his Wife, Eileen Ehler are the joint owners of the subject property known as No. 811 Queen Street in the Town of Port Hawkesbury. They reside in the property which they purchased in 1973. The house is a "Kent Home" and was erected at the time of the purchase of the land. The purchase price for the land and dwelling was $20,000.00.

Mr. Ehler referred to seven residential properties in his neighbourhood which he identified by photographs filed as exhibits as follows:

1. property located at 202 MacDonald Street owned by Malcolm and Doris Fancy (Exhibit E-4);
2. property at 213 MacDonald Street owned by Cyril and Gwen Dicks (Exhibit E-5);
3. property at 809 Queen Street, owned by Gladys Knight (Exhibit E-6);
4. property at 220 MacDonald Street owned by Robert and Linda MacKeigan (Exhibit E-7);
5. property at the corner of Queen and Rose Streets owned by James Langley (Exhibit E-8);
6. property at 815 Queen Street owned by Fred Baldwin (Exhibit E-9);
7. property at 810 Queen Street owned by

Herbert Dalley (Exhibit E-10).

Mr. Ehler stated that the property located at 202 MacDonald Street was assessed for $49,200.00 and had been offered for sale for $73,000.00 but had sold for $68,000.00 very recently. He obtained this information from Ralph MacKeigan a real estate agent. Mr. Ehler stated that he had never been inside this house but observed that it is a bigger house than the subject house. It has two fireplaces, a paved driveway and garage.

The Appellant stated that the property located at 213 MacDonald Street was assessed for $43,700.00 and had sold for $49,000.00 within the past two or three months. He had been informed of the price paid for this property by Jim Marchand of Canso Realties. This house is the same size as the subject house and does not have a garage.

Mr. Ehler testified that the dwelling located at 809 Queen Street separated from his property by a vacant lot is also a Kent Home similar to his except that his house has a couple of finished rooms with a bathroom and kitchen in the basement. The 800 Queen Street property is assessed for $39,100.00.

Mr. Ehler referred to property of Robert MacKeigan located at 220 MacDonald Street assessed at $42,100.00. Mr. Ehler although not personally familiar with the interior of this house, stated that he "understands" this house to have a completely finished basement. It is not a Kent type house and was built about 1975.

The fifth property which the Appellant endeavoured to compare with his own property is located on the corner of

Queen and Rose Streets (the James Langley property). It has a house with a full finished basement, a cement driveway, a large separate garage and a fenced yard. It is assessed at $41,000.00. He stated that it is not a Kent Home and he was not familiar with the interior of the house. He did not know the age of the house.

The next property Mr. Ehler used for comparison purposes is located at 815 Queen Street. He said that the dwelling on this property was bigger than his and had a fireplace. He also indicated that this property had nicer grounds than his and did not have a garage. He did not give any evidence as to the market value of this property. It is assessed at $41,500.00. Once again, Mr. Ehler had never been through this house and was therefore not familiar with the interior.

The seventh property referred to by Mr. Ehler is located at 810 Queen Street across the street from the subject property. It is owned by Hebert Dalley and is assessed for $36,800.00. This house is not a Kent type home and does not have a garage. It has a partly finished basement and was built five to seven years ago.

Mr. Ehler alleged that there are "other houses on the block that are much nicer than mine and I have the highest assessment in the whole block."

The Appellant testified that prior to the hearing of his appeal before the Regional Court his assessment had been reduced from $48,300.00 to $44,900.00 because of water problems in the basement. He stated that his house had been built on swampy land and water enters the basement through the foundation walls. He said he had experienced this water problem ever since the house had been built.

From cross-examination of the Appellant by Counsel for the Director it was apparent that the Appellant had very little information about the neighbours' dwellings he was using as comparables other than their assessed values and an impression gained from viewing their exterior appearances.

Alexander A. MacDonald, an assessor employed by the assessment division of the Department of Municipal Affairs testified on behalf of the Director. He has been employed as an assessor since February 1974 and carries out his assessment duties in the Inverness, Richmond, Victoria region including the Town of Port Hawkesbury. He has completed a three-year course at Dalhousie University in assessment principles and practice and has also completed a course in the use of Boeckh's Valuation Manual and a number of other courses sponsored by the Department of Municipal Affairs and has attended twelve schools for assessors. He has given evidence hundreds of times before the Regional Court. The Board accepted Mr. MacDonald as an expert witness qualified to give evidence on valuation of property for assessment purposes.

Mr. MacDonald identified Exhibit E-3 as an appraisal report which he prepared respecting the subject property. His report indicated a value for assessment purposes as of January 1, 1983, of $44,900.00 including a land value of $5,000.00.

The assessor arrived at his land value by using a front footage value of $70.00. The subject lot has a frontage of 62 feet and is 140 feet deep. The lot is serviced with municipal water and sewer. He stated that the standard lot size in Port Hawkesbury is 100 feet and therefore he applied a depth factor of 1.15 to the front footage value of the subject property to adjust for its extra depth. His calculation for land value is as follows:

62' x $70.00 = 4340 x 1.15 = $4,991.00

Mr. MacDonald testified that the $70.00 per front foot value used by the assessment department was based on an analysis of sales in the Town between 1981 and 1983. The 1984 residential assessments in the Town were based on the $70.00 per front foot for all areas of the Town except Tamarac Heights where a $50.00 per front foot figure was used.

Mr. MacDonald stated that the depth factor of 1.15 was obtained from a standardized depth table used by the assessment department. He explained that Tamarac Heights was owned by the N.S. Housing Commission and the sale price of the lots in that subdivision were based on $50.00 a front foot although recent sales of lots in that subdivision were in the vicinity of $70.00 to $80.00 a front foot.

Mr. MacDonald's report at pages 11 and 12 listed six sales of lots in the Town between 1981 and 1984 inclusive, all indicating a front foot value of $70.00 or higher.

The Board accepts the evidence of Mr. MacDonald as to the land value of the subject property in the amount of $5,000.00. The Appellant did not present a competing value.

The assessor in his report at page 4 describes the subject dwelling house as follows:

> "The subject property is a 1972 model Kent Home with three bedrooms, living room, dining room, kitchen and bathroom upstairs.
>
> It has a full basement which is half finished which consists of a living room, one bedroom, a bathroom and a small kitchen area. The house is completely finished inside and out. It is heated by hot water and served with water and sewer.
>
> There is an attached sun deck which is located on the back of the house."
>
> The subject land is zoned R-2.

Mr. MacDonald used both the cost and the market data approaches in his determination of the market value of the subject property. He determined the value of the subject property by using the cost approach to be the sum of $44,915.00 rounded to $44,900.00 as shown on page 13 of his report which reads as follows:

> "The cost approach to value was calculated as follows using the Nova Scotia Assessment Manual as a guide.

1 storey 44 x 24 = 1056 sq. ft.	= $26,383.
Sun Deck 10 x 48 = 480 x 5.90	= $ 2,832.
Addition for ½ finished basement	= $ 4,500.
Addition for additional plumbing	= $ 891.
Total Undepreciated Cost	$34,606.
The Dwelling was classified as a 3A-10% and was minused 10% at this point.	x .90%
	= $31,145.

Local Modifier of 1.78 = $55,438.

Depreciation for age & condition - 20% = $44,351.

Obsolescence allowed for water problems in basement also basement finish is not of same quality as the rest of the house - 10% = $39,915.

Estimated land value = $ 5,000.

Indicated property value $44,915.

or

$44,900."

Mr. MacDonald classified the subject property as class 3A according to the N.S. Residential Assessment Manual in calculating the undepreciated cost of the building in the amount of $34,606.00. He then deducted 10% from that amount because there were some elements in the house not up to the 3A standards, as for example the floor joists which were only 2" x 8" whereas the 3A category called for 2" x 10" joists. Also the interior framing is 2" x 3" whereas the 3A category calls for 2" x 4".

Mr. MacDonald applied a local modifier of 1.78 to adjust the January 1, 1978 costs obtained from the Residential Assessment Manual to January 1, 1983 costs (being the date prescribed by the Director of Assessment as the date that market value is to be determined by the assessor under the provisions of s.s. (1) of Section 38 of the Assessment Act). He then applied depreciation at the rate of 20% based on the fact that the dwelling is a 1972 Kent Home, thirteen years old. After applying the local modifier and taking depreciation at 20% Mr. MacDonald allowed for 10% obsolescence caused by the water leakage in the basement and because the basement finish is not of the same quality as the rest of the house. This resulted in a depreciated reproduction cost of $39,915.00 to which he added land value estimated at $5,000.00 for a total property value of $44,915.00 rounded to $44,900.00.

By applying the market data approach Mr. MacDonald arrived at a value of the subject property in the amount of $45,000.00. He compared the subject property to two sales of Kent Homes located in the Town. One was a 1981 sale and the other was a 1984 sale. It is noteworthy that the two properties used by Mr. MacDonald for comparison purposes are both situate in a different neighbourhood than the subject property. The location of all three properties is shown marked on the street map attached to the appraisal report. After carrying out adjustments based on the differences between the subject property and the two comparables, Mr. MacDonald arrived at an adjusted sale price for comparable No. 1 of $43,012.00 and $50,213.00 for comparable No. 2. Mr. MacDonald stated that he considered that property No. 1 was more comparable to the subject property than property No. 2 because the value of the adjustments were less for property No. 1 and there were fewer adjustments made. He considered that the subject property was a better property than comparable property No. 1 because "I felt the fact that it had a living area in the basement and a sun deck".

Mr. MacDonald, on direct examination, stated that the property referred to by Mr. Ehler as 220 MacDonald Street (Photograph Exhibit E-7) was actually 103 MacDonald Street. He also stated that the property referred to by Mr. Ehler located on the corner of Queen and Rose Streets (photograph Exhibit 8) was civic No. 112 Rose Street.

Mr. MacDonald explained why the property at 807 Queen Street assessed for $39,100.00 was assessed lower than the subject property. He stated that the area of the main part of the house is the same (44' x 24') but the deck is 10' x 30' whereas the subject deck is 10' x 48'. Also he stated that 807 Queen Street had electric heat and the subject home had hot water heating. Also none of the basement area is finished in the 807 Queen Street house.

When asked about the land value assessment for 807 Queen Street Mr. MacDoald said it was assessed at $3,800.00 and the lot was 65' x 140' in size. When asked to explain why Mr. Ehler's lot was valued at $5,000.00 with dimensions of 62' x 140', Mr. MacDonald stated that "there was an obsolescence given on this particular property previous to the last re-assessment." Mr. MacDonald stated that the land at No. 807 was assessed too low and if he were doing a re-assessment he would value it at $5,200.00 (65' x $70.00).

Mr. MacDonald was asked to explain the difference between $49,200.00 the assessment value of property at 202 MacDonald Street and $44,900.00, the assessment of the subject property. He said No. 207 MacDonald Street is a slightly larger house has an attached garage and has two fireplaces. It has an unfinished basement but does not have a sun deck. The lot is smaller than the subject lot, being 60' x 100'. It sold recently for $67,000.00.

According to Mr. MacDonald, the general level of assessment in 1983 was 101% based on approximately 40 sales.

Mr. MacDonald also explained the differences between property at 112 Rose Street assessed for $41,000.00 and the subject property. Firstly, the dwelling at 112 Rose Street is smaller, 960 square feet compared to 1056 square feet. It is older, having been built in 1969 compared to 1973 for the subject property. 112 Rose Street has a fireplace but the basement is not finished. It has a detached garage. It has forced hot air heating whereas the subject property has hot water heating. The lot is 68' x 110' compared to 62' x 140' for the subject lot. The lot is assessed at $4,200.00 compared to $5,000.00 for the Ehler Lot. 112 Rose Street does not have a deck according to Mr. MacDonald's direct evidence. On cross-examination; Mr. Ehler pointed out from the photograph filed as Exhibit E-8 that the house at 112 Rose Street does have a small deck about 10' x 12'.

On cross-examination Mr. MacDonald stated that his comparable sale No. 2 was a property which sold for $52,000.00 and had its assessment reduced by the Regional Court to $42,900.00. He could not state what the original assessment had been.

Mr. Ehler questioned Mr. MacDonald concerning the "Fancy" house, located at 202 MacDonald Street (Photograph

Exhibit E-4). When asked when he was last in the Fancy house, Mr. MacDonald stated "I have never been in Fancy's house". When asked how was the assessment made respecting the Fancy house, the assessor stated that "it was done from the information contained on the cards previously, from previous assessments". Mr. MacDonald explained that the assessors endeavour to go in every home in the Town and make two efforts to gain admission. If they fail they will try the following year.

Further to a question from the Board, Mr. MacDonald explained that he was the person who reduced the Appellant's assessment from $48,300.00 to $44,900.00. He said that "basically it was a water problem he was having in his basement that I was not aware of on the first inspection and on the second inspection there was water in the unfinished area of the basement and portions of the carpet were wet in the other part of the basement." He stated that additional reasons for the reduction was the fact that the basement was not finished "plus the quality of the rest of the home - the first floor".

Mr. MacDonald disagreed with Mr. Ehler's evidence that his was the highest assessed property on the block and stated that Mr. Ehler's was not the highest.

In response to a question from the Board Mr. MacDonald explained that he chose his two comparable properties which are located in the Tamarac Heights subdivision because they are both Kent Homes and their sales took place within a reasonable time from the appraisal of the subject property. He explained that a Kent Home is constructed from prefabricated materials which come to the site in sections and are bolted together.

The Appellant in his summation stated that "I don't know if I proved anything here today. I guess we both proved that my house is assessed 100% of the value...". He pointed out that he was not trying to get his neighbours' assessments higher but simply wanted to get his "down to $40,000.00". He submitted that other houses in his neighbourhood "are assessed at 60, 70 and 80% of the value, I would like mine reduced accordingly." He alleged that he was being discriminated against in that he considered his property was "over assessed as compared to every other house in my immediate area."

Counsel for the Director pointed out that the Appellant because he had appealed his assessment had his property subjected to a thorough inspection by the assessor whereas his neighbours' properties had not received this type of inspection and therefore the assessor may not have been aware of possible improvements to the neighbours' houses which if known to the assessor would result in higher assessments.

Counsel for the Director submitted that the market data approach to value is a more reliable means of arriving at market value than the cost approach although in this case the two estimates of value were within $100.00 of one another.

It is clear from the evidence that Mr. Ehler is not an expert in the matter of evaluating real estate. He is however, strongly of the opinion that his property assessed at $44,900.00 is assessed at 100% of its market value and other properties in his neighbourhood are assessed at less than market value. The Appellant referred to seven properties in his neighbourhood and referred to the assessments for each. Of the seven properties he had information as to the sale price for only two properties, namely 202 MacDonald Street assessed for $49,200.00 and which sold in 1985 for $68,000.00 and 213 MacDonald Street, assessed for $43,700.00 which had sold in 1985 for $49,000.00. Mr. Ehler considered that his property was not assessed for more than its market value and in fact he considered that his property was assessed at 100% of its market value. He was however concerned that the assessor had discriminated against him by assessing him at 100% of market value whereas he felt strongly that his neighbours' properties were assessed at various percentages under 100% of market value. He was not able to offer convincing evidence as to market value of the comparison properties. His whole case was based on his belief that the assessor had not assessed his property on a uniform basis with his neighbours' properties.

The assessor, Mr. MacDonald whose qualifications as an assessor are beyond dispute carried out a detailed appraisal of the Appellant's property and using both the cost approach and the market approach arrived at an assessment of $44,900.00 which the Board is prepared to accept as being the best evidence available as to the value of the subject property. The assessor clearly took into account the water problem experienced by the Appellant and in my opinion evaluated his property in accordance with Section 38(1) of the Assessment Act which came into effect as a result of amendments to the Assessment Act by virtue of

Chapter 15, Statutes of Nova Scotia, 1984, assented to on June 11, 1984, and therefore applied to assessments for the 1985 assessment year. Section 38(1) reads as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the Town or Municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the town or municipality."

S.S. (1) of Section 38 provides that property must be assessed in such a manner that "...taxation falls in a uniform manner...". There have been a number of judicial pronouncements on the subject of uniformity of assessment in Nova Scotia by the Appeal Division of the Nova Scotia Supreme Court (See Re Mersey Paper Company Ltd. and the Municipality of the County of Queens, 42 M.P.R. 297; Re: Mindamar Metals Corporation Limited v. Richmond (1953) 33 M.P.R. 75; Re: Lehndorff Management Limited v. City of Dartmouth (1976), 15 N.S.R. (2d.) 40; Re: Morash v. Municipality of Chester (1961), 28 D.L.R. (2d.) 428; and Re: Hebb v. Town of Lunenburg (1979) 32 N.S.R. (2d.) 427.

Chief Justice MacKeigan in the Hebb case stated at pages 434 - 437 what appears to be the law in Nova Scotia respecting the principle of uniformity in relation to assessments as follows:

> "In carrying out his investigation a county court judge must determine the valuation of the property in issue

in accordance with the principles laid down in s. 38, just as the assessor is supposed to do. See Parker, J., in Glace Bay v. Seaborad at p. 833.

Ilsley, C.J.N.S., for the Court in Mersey Paper Co. v. County of Queens (1959), 42 M.P.R. 297 (N.S.C.A.) (p. 309)

I think the history of the rule and the words beginning 'so as' show that the Legislature...intended that the dominant and controlling factor in determining the amount at which property is to be assessed should be not its actual cash value but uniformity. I think the first part of the rule directing assessment of property at its actual cash value is subsidiary or subordinate to the latter part of the rule. The use of the words 'but' (in introducing the latter part of the rule), 'shall', and the words beginning 'so as to ensure' point to this conclusion.

Chief Justice Ilsley commented in Re Mindamar Metals Corporation Limited and Municipality of the County of Richmond (1953), 33 M.P.R. 75 (N.S.C.A.) at p. 78:

If this were a case where there was in the municipality property of a like class with the property the assessment of which is complained of, and also a general level of assessed values of such property of like class which bore a lower ratio to the actual cash value thereof than the ratio of the assessed value to the actual cash value of the property whose assessment is complained of, it may very well be that the assessment complained of should be lowered even though it is not in excess of the actual cash value.

In Lehndorff Management Ltd. v. City of Dartmouth (1976), 15 N.S.R. (2d.) 40, 14 A.P.R. 40, (N.S.C.A.), Macdonald, J.A., (p. 45) approved the above statements and emphasized that since the Mersey paper case:

...uniformity rather than actual cash value is the dominant and controlling factor in determining the amount at which property is to be assessed.

The uniformity that is thus dominant and controlling is not, however, uniformity unrelated to "actual cash value". "Uniformity" is not to be based on some general community or judicial standard of fairness or value or comparability.

The test of uniformity arises where, as Chief Justice Ilsley said in Mindamar, supra, there is a "general level of assessed values of other properties which bore a lower ratio to the actual cash value thereof than the ratio of the assessed value to the actual cash value of the property whose assessment is complained of..." In Morash v. Municipality of Chester, supra, Ilsley, C.J., referred to Mindamar and Mersey paper and said (28 D.L.R. (2d) at p. 429):

As will be seen, I do not think that the mere fact that the assessor assessed certain other individual properties lower in relation to their actual cash value than he assessed the appellant's property is ground for allowing the appellant's appeal. If may be that the other assessments are out of line rather than his. I think a comparison between the assessment of the appellant's property and those of others would be relevant only if it were shown that the general level of assessment of properties in the municipality was lower in relation to the actual cash value, as defined in the Assessment Act, R.S.N.S. 1954, c. 15, than the assessment of the Appellant's property. (My emphasis).

At p. 430, he continued:

In assessing the appellant's property, therefore, it was the assessor's duty to determine its actual cash value, but if, because of the failure of the assessor to discharge his duty with regard to the assessment of other properties in the municipality a general level of assessment had been established which was below actual cash values by a fairly definite percentage thereof, it would have been the duty of the assessor to discount for purposes of assessment the actual cash value of the appellant's property to a level which was of the same percentage below its actual cash value.

To show error by the assessor, an appellant such as Mr. Hebb accordingly must either

> establish that his property was assessed at more than its actual cash value, and here the actual cash value was admitted to be at least $43,900.00, or prove that "the general level of assessment of properties in the municipality was lower in relation to the actual cash value" than was his assessment.
>
> A county court judge in an assessment trial de novo should apply the s. 38 rules as directed by Chief Justice Ilsley. He should, I suggest, first ascertain the actual cash value of the property under appeal and determine the ratio of the assessment to that value. He then should determine the "general level of assessment" relative to the actual cash values of properties in the town or municipality generally. To do so he should ascertain on the evidence before him whether the general assessment ratio is what the assessor states it is or whether it is a different ratio. In most cases lack of other evidence may compel him to accept the assessor's ratio. If the ratio is thus higher, the judge should reduce the appealed assessment to conform with the general ratio."

It is noteworthy that the above quoted comments of Chief Justice Ilsley made in Re Mindamar Metals Corporation Ltd. (Supra) were made in reference to the meaning of Rule 2 of Section 17 of the Assessment Act (1938 S.N.S. c. 2) then in effect. Section 17 of the 1938 Assessment Act governed the methods of making assessments. Rule 2 of Section 17 of the Assessment Act in effect at the time of the Mindamar decision read as follows:

> "All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties of the like class in the town or municipality."

Rule 2 was amended after the Mindamar case in 1954 by Section 3 of Chapter 38, S.N.S. 1954. Section 3 provides that:

> "Rule 2 of Section 17 of said Chapter 2 is amended by striking out the words 'of the like class' in the seventh line thereof, and by adding thereto the words 'so as to ensure that taxation shall fall in a uniform manner upon all real property in the town or municipality and that taxation shall fall in a uniform manner upon all personal property in the town or municipality."

It is important to note that Rule 2 before the 1954 amendment directed the assessor to "have regard to the assessment of other properties of the like class in the town or municipality" (emphasis added). After the 1954 amendment the rule provided that the assessor "shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation shall fall in a uniform manner upon all real property in the town or municipality...".

Rule 2 of Section 17 as amended in 1954 is substantially the same with respect to uniformity as Section 38 of the Assessment Act, R.S.N.S. 1967, c. 14 in effect immediately prior to the 1984 amendments to the Assessment Act.

After the 1954 amendments to the Assessment Act uniformity appeared to be uniformity with all real property in the town or municipality and not merely with other real property of a like class as was the case prior to the 1954 amendments. After the 1984 amendments the uniformity requirement as it is expressed in s.s. (1) of Section 38 of the Assessment Act appears to direct the assessor to establish assessments uniform on the one hand for all residential and resource property in the town or municipality and uniform on the other hand for all commercial property in the town or municipality.

If the Appellant had been able to prove that the percentage of his property's assessment to the market value of his property was higher than the general level of assessment of residential and resource property in the municipality, the Board would have been obliged to reduce his assessment to the general level of residential and resource assessment in the municipality so as "to ensure that taxation falls in a uniform manner upon all residential...property..." in accordance with s.s.(1) of Section 38 of the Assessment Act.

The Board accepts the evidence of Mr. MacDonald, the assessor that the general level of assessment in the Town of Port Hawkesbury in 1983 was 101%. Since by the Appellant's own admission his property is assessed at 100% of its market value and the evidence of the assessor indicates that the market value of the Appellant's property is $44,900.00 and since the general level of assessment in 1983 was 101% the Appellant is not able to say that his property does not meet the test of uniformity as enunciated by Chief Justice MacKeigan in the Hebb v. Town of Lunenburg case. The fact that some properties in the neighbourhood of the Appellant's property are assessed at a lower percentage of market value than the Appellant's property is not in itself grounds for reducing the Appellant's assessment.

The Board finds as a fact, based on the evidence of the assessor that the general level of assessment of residential properties in the Municipality (101%) was not lower in relation to market value than the assessment of the Appellant's property which was 100% of its market value.

The Board is satisfied on the evidence before it that the Appellant's property located at 811 Queen Street in the Town of Port Hawkesbury is assessed at its market value of $44,900.00 in accordance with Section 38 of the Assessment Act and that the Appellant has not discharged the onus on him of showing that the assessment of his property was incorrect, that is, too high because of an alleged lack of uniformity of assessment.

The decision of the Regional Assessment Appeal Court is hereby confirmed and the appeal is dismissed without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 28th day of October, A.D., 1985.

RHBlois

R.H. BLOIS, Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Director of Assessment v. Moffatt Brothers Ltd.

ASSESSMENT--COMMERCIAL--MARKET VALUE--REPLACEMENT COST METHOD--PHYSICAL DEPRECIATION--FUNCTIONAL OBSOLESCENCE --ASSESSMENT ACT, SS. 38, 39

This is an appeal by the Director of Assessment from a decision of the Colchester Regional Assessment Appeal Court which reduced the 1983 commercial assessment of the Moffatt Brothers Ltd. property on Court St., Truro from $690,000.00 to $598,000.00. The property is used by a company related to Moffatt Brothers for a trucking operation involving the transport of freight and the moving and storage of household furnishings. The site is irregular in shape, consists of 165,549 sq. ft. of land and contains two buildings, the larger of which was broken for identification purposes into seven smaller buildings according to the date of their construction. The original building dated back to 1840. For the purposes of this appeal the assessor determined the assessed value to be $720,000.00 and Moffatt's appraiser determined it to be $475,900.00.

HELD: The Board fixes the assessed value of the subject property for 1983 at $565,000.00. Moffatt Brothers is entitled to its costs taxed on a party and party basis on the County Court scale.

The issue to be determined in this appeal is the assessed value of the subject property for the 1983 assessment year. To determine market value as required by s.38 of the Assessment Act the assessor used only the depreciated replacement cost method. Moffatt's appraiser relied mainly on this method as well. The replacement cost method involves valuing the land and adding to it the depreciated value of buildings and other improvements. The greatest weakness in the cost approach is in measuring the amount of depreciation. The Board adopts this method. The assessor and Moffatt's appraiser agree on land value, the reproduction cost of the buildings, the value of underground tanks and pumps and that the buildings suffer from a considerable amount of physical depreciation and functional obsolescence. They disagree as to the extent of such depreciation and obsolescence. In this property, estimating the amount of depreciation is very difficult because the buildings are old and obsolete. A generally accepted method to measure functional obsolescence, used here, is to construct on paper a replacement building to replace the present needs/utility of the subject building. The Board accepts the assessor's evidence on the amount of functional obsolescence. He prepared a more thorough analysis of the present utility of the subject building and was more particular in determining how much space was needed for each aspect of Moffatt's operation. The Board accepts the evidence of Moffatt's appraiser with respect to the rate of physical depreciation to be applied, which is 66.98%. The Board is satisfied he has greater experience and knowledge in appraising old multi-storey industrial buildings. The Board fixes the assessed value at $565,000.00 and accordingly adjusts the business occupancy assessment.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 67 c.14 as amended;

- and -

IN THE MATTER OF: An Appeal by the Director of Assessment from a decision of the Regional Assessment Appeal Court, Colchester Region, dated March 1, 1984 respecting the 1983 commercial assessment of property located at 62 Court Street, Truro, N.S. owned by Moffatt Brothers Limited.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: MARIAN TYSON, LL.B., for the Director of Assessment

MARK McCREA, LL.B., for Moffatt Brothers Limited.

DECISION

By Notice of Appeal dated March 16, 1984 and received by the Board on March 20, 1984, the Appellant, the Director of Assessment (hereinafter referred to as the Director) appealed the decision of the Regional Assessment Appeal Court, Colchester Region, dated March 1, 1984 which reduced the 1983 commercial assessment of the property known as Civic Number 62 Court Street, Truro, Nova Scotia owned by Moffatt Brothers Limited (hereinafter referred to as Moffatt) from $690,000.00 to $598,000.00.

The grounds of appeal as set out in the Notice of Appeal filed as Exhibit M-1 are as follows:

> "1. THAT the Court erred in stating that the assessor used a combined depreciation factor of 68 percent;
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> 2. THAT the Court erred in that it combined all forms of depreciation and applied an overall depreciation of 75 percent to the undepreciated reproduction cost of the buildings;
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> 3. THAT the Court erred in that as a result of combining all forms of depreciation and applying 75 percent depreciation to the undepreciated reproduction cost of the buildings, the Court applied double depreciation;
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> 4. THAT the Court erred in increasing the depreciation used by the assessor;
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> 5. THAT the Court erred in finding that "adequate consideration was not given to functional depreciation" by the assessor;
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> 6. Such other grounds that may appear from the evidence."

There was no objection to the Board's jurisdiction to hear the appeal and the Board proceeded to hear the merits of the appeal.

Evidence on behalf of the Director was given by Clair Peers, N.S.I.A., I.A.A.O., M.R.A.A.O., a Senior Assessor in the Colchester Assessment Region. Evidence on behalf of Moffatt was given by Fergus Omond, A.A.C.I., an accredited appraiser.

The Moffatt property is located on the west side of Court Street, between Prince Street and Queen Street in the Town of Truro. It is bounded on the north by the lands of Wilson Equipment Limited and John Snook, on the south by lands of John Snook, on the west by the lands of Keddy's Motor Inn and on the east by Court Street. The site is irregular in shape and contains 165,549 square feet. Approximately 10,059 square feet on the southern part of the lot is subject to a right-of-way in favor of John Snook. John Snook has granted a right-of-way in favor of Moffatt extending from the southern boundary of the Moffatt property and with the northern boundary of the Snook property, through the Snook property to the north side of Prince Street. This right-of-way contains 6,437 square feet and enables vehicle access to the rear or western part of the Moffatt property which is not possible from Court Street.

The topography of the site from Court Street to a point approximately 200' west of Court Street is generally flat and level with the grade of Court Street. The site then slopes gradually towards its rear or western boundary. Portions of the building on the rear part of the lot are constructed on this slope. The lot is not paved but it does have a gravel base. The ground floor area of the buildings on the lot is approximately 42,361 square feet. The remaining 123,188 square feet of land is used for parking vehicles and access to loading facilities. The lot is shown on a site plan forming part of both the Assessor's Report filed as Exhibit M-1 and the Omond Report filed as Exhibit M-17. The property is zoned Commercial-General (C-1).

The property is used by Moffatt Freight and Express Ltd. a Company related to Moffatt Brothers Limited, for their trucking operation which involves the transport of freight and the moving and storage of household furnishings. The location of the site in the Town of Truro is an excellent location for the Moffatt operation.

The site is improved with two buildings. The larger of the two buildings was constructed in stages between 1840 and 1940. Both the assessor and the appraiser have separated the larger buildings for identification purposes into seven smaller buildings according to the date of their construction. These seven buildings are attached to one another and constitute the larger building on the site. The smaller detached building is referred to by the assessor and the appraiser as Building No. 8.

Building No. 1, the original building which was constructed in 1840, was built and used as a textile mill. This building fronts on Court Street and consists of three stories, an attic and basement. The first and second floors of the building are used as offices by Moffatt. The third floor is used as a bunk house for drivers, that is, a place to sleep and/or rest during stop-overs. Part of the third floor is used to store files. The attic and basement are not used. The total area of the building including basement is 11,549 square feet.

Buildings 2, 3, 4 and 6, constructed in 1908, 1911, 1926 and 1940 respectively, each contain four stories and a basement. The total area of the four buildings is 58,920 square feet excluding the basement which has an area of 13,730 square feet. These buildings are used by Moffatt as a warehouse for the storage of furniture. However, the basement area of each of these buildings is used only for the storage of "junk". The buildings are constructed of wood frame walls, wood superstructure, wood floors and a wood roof and were once part of a textile mill operation.

Attached to the rear or western end of these buildings is Building No. 5. This building was added in 1929. It is a three storey concrete structure. Approximately 50% of the first floor is used as a machine shop and the remainder is used for storage. The second floor is used as an office area and the third floor contains warehouse space. The total building area is 24,225 square feet with 8,075 square feet per floor.

Attached to the north side of Building No. 4, is Building No. 7 which was added in 1940. It is a one-storey wood frame structure with a concrete basement. The basement which contains an area of 8,640 square feet is used for the storage and warehousing of freight brought in for redistribution. The main floor, which contains an area of 8,640 square feet is used for a tire repair shop, carpentry shop and for general storage.

Attached to the basement level of Building No. 7 is a L-shaped loading dock containing eleven bays with metal overhead rolling doors. The loading dock was added in 1974.

Building No. 8 is a one-storey structure without basement. This building was constructed in two stages but the exact dates of construction are unknown. This building is used to repair vehicles and contains five service bays. A small part of the building (14' x 20') houses the boiler.

Recent improvements to the buildings include the addition of steel siding (at an approximate cost of $40,000.00) on a portion of the building, the installation of a new boiler, updating the sprinkler system to meet fire code standards and some alterations to office space. Aside from these improvements there has been little done in the way of modernizing these buildings.

At Page 72 - 78 of his report, Fergus Omond described some of the items contributing to the overall physical deterioration and functional obsolescence of the subject buildings.

> "1. Age and Poor Physical Condition
>
> Apart from the loading dock, Buildings No. 1 through 8 have an average or composite age of almost 65 years, and the "wood frame" buildings that is Buildings No. 2, 3, 4 and 6 alone have a composite or average physical age of 72 years. If we consider the fact that the normal economic life expectancy for new wood frame buildings of the subject's class is only 30 to 35 years based on normal maintenance and care etc., then the seriousness and extent of physical depreciation and deterioration to these buildings become very apparent in that they have had virtually little to no repairs, maintenance and modernization for many, many years.
>
> 2. Type of Construction Materials
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> The wood timber frame, wood roof structure and wood walls etc., in Buildings 1, 2, 3, 4, 6 and 7 are of the type no longer in use in modern buildings of today. These types of materials tend to increase normal maintenance and repair costs above the modern steel and concrete block buildings. In addition to that, "insurance premiums" for wood frame buildings of this class are higher than for modern steel buildings.
>
> 3. Style of Construction
>
> The vertical or stacked construction of Buildings 1 through 7 comprise some 105,082 square feet. Although

it is not uncommon to have industrial office space on the second floor, modern industrial or warehouse space is seldom built above the first level today. In the case of the Moffatt property, there was a total of about 92,700 square feet of warehouse and shop space, and of that only 35,000 square feet or about 38% of the total area was located on the first or grade level. Of the 35,000 square feet of warehouse and shop space at grade level, only 8,075 square feet was of masonry construction, the balance being light to medium wood frame construction. That is not to say that some use cannot be made of certain aspects of the subject space above grade, but from a warehousing point of view that space has very diminished utility because it is not at grade level. So that in addition to the inutility inherent in about 62% of the subject building by virtue of its construction and design limitations etc., that same 62% is located above the first floor.

4. Shape

The subject involved a long narrow building constructed and added to in different stages over the past 140 years. From a shape standpoint, it was poor, involving a total of 1,510 lineal feet of exterior walls, with many different corners and a width through the main warehouse area of only 55'. This manner of building increases overall construction costs, increases maintenance costs and at the same time decreases interior building efficiency or use. The total ground floor area of Buildings 1 through 8 involve some 37,841 square feet. So that realistically speaking, that same space could be accommodated in a building measuring 120' by 315', which would result in only 870 lineal feet of exterior walls.

5. Limited Floor Load Capacity

Another major impediment to the good and full use potential of this building is the limited floor load capacity, which of course results from its wood construction and the deterioration of the building as a whole and more obviously the floor load limitations on account of the structural problems evident in the basement. As I have pointed out, modern warehousing today almost without exception utilizes powered fork-lifts. In the case of the Moffatt building, the wood frame aspects of Buildings 2, 3 and 4 cannot carry the weight of fork-lifts and although the masonry building i.e., Building No. 5 could, there is no way to get a fork-lift from the other buildings into that masonry building. So effectively speaking, the furniture and freight stored in these warehouses must be moved and carted by means of hand trolleys. This of course reduces the efficiency and at the same time increases general operating costs.

6. Ceiling Clearance

Notwithstanding the floor load limitations throughout most of the Moffatt property, the average clearance throughout the entire complex is only about 8'6". Even at that, the building was not originally designed for fire sprinklers and although those sprinklers have been installed in order to meet current fire regulations, the sprinklers have been hung below existing timber beams in many cases thereby reducing that clearance even further.

7. Column Spacing

All of the subject's warehouse space is interspersed throughout with wood and concrete structural columns, and in most instances, those columns have only 12' to 14' centers, far less than what is recognized as efficient in modern buildings being built today. In addition to the vertical columns, there is heavy wood cross bridging built into the wood frame aspects of this property, all of which further reduces the efficient use of the floor space.

8. Floor Plan

Because this building was constructed in different stages dated back over 140 years, the overall floor plan or floor arrangement is very inefficient and poor. An example of this is evident in the fact that the main warehouse and office areas are spread about four floors, thereby requiring space for stairwells, corridors and working passageways on each of those floors. If that space was all on one floor, then there would be no such space lost to stairwells, extra wide corridors and passageways. Another example of the poor floor plan are the two office areas. The Court Street offices in Building No. 1 are some 220' away from the offices in Building No. 5. In order to get from the offices in Building No. 1 to the offices in Building No. 5, one must walk through the central corridor area of the main sufference warehouse i.e., Building No.'s 2, 3 and 4 and because none of those buildings are heated, the staff have to don their heavy coats in winter months.

9. Super-Adequacies of Building No. 5

Just as the "light to medium" wood frame aspects of this property are structurally inadequate, in view of modern concrete block and steel frame buildings of today, the heavy reinforced masonry construction of Building No. 5 is most definitely an over-improvement for both warehouse and general industrial use such as it is presently utilized for.

10. Size

The total size of the Moffatt property including basement and loading lock areas etc., as summarized on Page 55 of this report was as follows:-

1st Floor		37,841 S.F.
2nd Floor		25,638 S.F.
3rd Floor		25,658 S.F.
4th Floor		14,730 S.F.
Basement		25,142 S.F.
	Total	133,549 S.F.

This building on the whole is much too large for Moffatts present operation, and for that matter it would in my view be highly unlikely and very improbable that one could find an occupant or purchaser to take over and use all of this space, having regard for the numerous limitations and problems throughout the buildings as as cited herein.

Based on my original inspection of this property together with information supplied by Moffatts controller, it was determined that there had only been about 56% of the entire space in full use and 26% of the space in partial use. The balance of the space, 18% more or less had not been used at all."

Mr. Peers agrees with Mr. Omond that the buildings suffer from a considerable amount of physical depreciation and functional obsolescence but he contends that the degree of depreciation and obsolescence is not as extensive as that portrayed by Mr. Omond.

The issue to be determined in this appeal is the assessed value of the above described property for the 1983 assessment year.

For purposes of this appeal, Mr. Peers determined the assessed value to be $720,000.00 and Mr. Omond determined the assessed value to be $475,900.00.

Mr. Peers said that the initial 1983 assessment was $690,000.00, which is the same value placed on the property for the 1981 and 1982 assessment years. He explained that the practice throughout the province is to re-assess properties every three years and the last reassessment in the Town of Truro was in 1981. He said that unless there were improvements to the property or the property's assessment was appealed, the 1982 and 1983 assessments would remain the same as the 1981 assessment. He stated that he did not prepare the 1981 assessment of the subject property but he was responsible for the 1982 and 1983 assessments. Mr. Peers said that Moffatt hired Mr. John Hiltz, C.R.A., to review the 1981 assessment of $690,000.00 with a view to appealing that assessment. Although he did not prepare the 1981 assessment, Mr. Peers reviewed that assessment with Mr. Hiltz. After his review of the 1981 assessment, Mr. Peers was of the opinion that the Moffatt property should have been assessed at $748,000.00 and not $690,000.00. He said that Mr. Hiltz recommended to Moffatts that they not appeal the 1981 assessment. Mr. Peers did not alter the 1982 or 1983 assessment of $690,000.00 because of a policy of the assessment division of the Department of Municipal Affiars of keeping assessments the same for each year of a three year reassessment cycle. However, for purposes of this appeal and after adjustments to take into account some matters raised by Mr. Omond, Mr. Peers determined the market value for assessment purposes of the subject property for 1983 to be $720,000.00.

The basis of evaluation of property for assessment purposes is found in Sections 38 and 39 of the Assessment Act, R.S.N.S 1967 Chapter 14 as amended which read as follows:

> "Section 38 All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality.
>
> Section 39(1) Except as provided in this Act, property shall be valued by the assessor as if the person assessed were the owner of the title in fee simple and no reduction in value shall be made merely because the property is subject to any lien, mortgage, lease, claim, license or other encumbrance on the title."
>
> Section 39(2) Where there is an easement or right of way appurtenant to any land, the assessment of the dominant tenement shall be increased by the added value that in the opinion of the assessor it receives from the easement or right of way and the assessment of the servient tenement shall be reduced by the amount that in the opinion of the assessor the value has lost because of the easement or right of way.
>
> Section 39(3) Notwithstanding Section 178 where a dominant tenement is sold for arrears of taxes, the easement or right of way appurtenant thereto shall pass to the purchaser and where a servient tenement is sold for arrears of taxes, the sale shall not terminate or affect an easement or right of way to which it is subject."

The Courts have recognized five methods to determine the market value of properties for assessment purposes. These methods cited in the case of Sun Life Assurance Company of Canada v. City of Montreal [1950] S.C.R. 220 affirmed Montreal v. Sun Life Assurance Company of Canada [1952] 2 D.L.R. 81, P.C., are as follows

> "(a) A recent free sale of the property itself where neither the conditions of the property nor the market have since changed;
>
> (b) Recent free sales of identical properties in the same neighbourhood and market;

(c) Recent free sales of comparable properties;

(d) The price which the revenue producing possibilities of the property will command;

(e) The depreciated replacement cost."

The assessor, Mr. Peers, used only the depreciated reproduction cost method to value the subject property. The appraiser, Mr.Omond, relied mainly on the depreciated replacement cost method to value the property. However, he also took into consideration a recent sale involving the property and recent sales of comparable industrial properties.

Both Mr. Peers and Mr. Omond agree that the income method is not an appropriate method to value the subject property and that there were no recent sales of identical properties in the same neighbourhood and market as the subject property.

The replacement cost method involves valuing the land and adding to it the depreciated value of buildings and other improvements. The weakness in this method is the difficulty in estimating the amount of depreciation.

Mr. Peers calculated the value of the property by the cost method as follows:

Land Value		$104,000.00
Building Value		
Reproduction Cost New	$1,907,460.00	
Less: Physical Depreciation	1,061,267.00	
	846,193.00	
Less: Functional obsolescence-28%	236,934.00	
Depreciated Building Value	609,259.00	$609,259.00
Tanks and Pumps		6,762.00
		$720,021.00
ROUNDED TO:		$720,000.00

Mr. Omond calculated the value of the property by the cost method as follows:

Land Value		$104,000.00
Building Value		
Reproduction Cost New	$1,907,460.00	
Less: Depreciation-all causes	1,542,290.00	
Depreciated Building Value	365,170.00	365,170.00
Tanks and Pumps		6,762.00
		$475,932.00
	ROUNDED TO:	$475,900.00

Mr. Peers and Mr. Omond agreed that the land value for the purposes of the 1983 assessment is $104,000.00. Mr. Peers' Assessment Report (Exhibit M-7) includes a section dealing with his calculation of the value of the land but Mr. Omond's Appraisal Report (Exhibit M-17) does not include any details on the property's land value.

At the request of Moffatt, Mr. Omond prepared an appraisal of the market value of the subject property in April 1982 for possible refinancing purposes by Moffatt. A copy of this Appraisal Report was filed as Exhibit M-18. This appraisal was not prepared with the intention of appealing the property's assessment for municipal tax purposes. At that time, Mr. Omond estimated the market value of the land at $327,500.00 which is considerably higher than the figure of $104,000.00 put forward by Mr. Peers and agreed to by Mr. Omond for this hearing. Mr. Omond said that the value of $327,500.00 was the value of the land at its "highest and best use vacant" in April 1982 whereas the value of $104,000.00 is the value of the land in use as a non-conforming industrial property on January 1, 1980.

In determining the land value of the subject property, Mr. Peers considered the sales of three parcels of vacant land. Property No. 1 located in the Town of Truro, contains 34,580 square feet and it sold in March 1979 for $25,000.00 or .72¢ per square foot. Property No. 2, located in the Town of Truro, contains 15,000 square feet and was sold in August 1983 for $21,500.00 or $1.43 per square foot. Property No. 3 located just outside the town boundaries, contained 94,750 square feet and it sold in February 1977 for $107,000.00 or .89¢ per square foot. None of these properties were used for industrial purposes when purchased nor zoned Industrial at the time of sale.

Based on these sales, Mr. Peers estimated the square foot value of Commercial land in Truro as of January 1, 1982 to be .75¢. He calculated the land value to be $122,800.00 as follows:

155,490 sq.ft. at $.75	$116,617.00
16,496 sq.ft. at $.75 x 50%	6,186.00
Land value at January 1, 1982	$122,803.00
ROUNDED:	$122,800.00
General Level of assessment- 85%	.85
Land Value at January 1, 1980	$104,380.00
ROUNDED:	$104,000.00

He discounted the value of the land subject to a right-of-way by 50% because Moffatts did not have the sole use and control of this land. He then applied the general level of assessment for 1982 in the Town of Truro of 85% to get an assessed value of land at January 1, 1980 of $104,380.00 which he rounded to $104,000.00.

Mr. Peers and Mr. Omond agree on the value of the underground tanks and pumps located on the site at $6,762.00.

Mr. Peers and Mr. Omond both calculate the reproduction cost new of the buildings as of January 1, 1980 to be $1,907,460.00. Both relied upon Boeckh's V-Day Manual to estimate the reproduction cost new and both Mr. Peers' report and Mr. Omond's report summarize their calculations. Mr. Peers and Mr. Omond indicated that they independently calculated the reproduction cost of the building and their findings were very close. They had a meeting and after reviewing one another's cost calculations they reached agreement on the figure of $1,907,460.00 as the best estimate of the reproduction cost new of the subject buildings.

Both Mr. Peers and Mr. Omond agree that the property does not suffer from economic obsolescence.

The difference between Mr. Peers estimate of market value of $720,000.00 by the cost method and Mr. Omond's estimate of market value of $475,900.00 is $244,100.00. This difference in value is due entirely to the different amounts of physical depreciation and functional obsolescence applied to the subject property by Mr. Peers and Mr. Omond. As stated earlier in this decision, the greatest weakness in the cost approach is in measuring the amount of depreciation in a property. The age and condition of the subject buildings and their functional deficiencies to accommodate the Moffatt's uses make estimating the amount of depreciation in this property very difficult.

FUNCTIONAL OBSOLESCENCE - MR. PEERS

Mr. Peers calculated the functional obsolescence of the subject buildings by constructing a replacement building having all the ammenities to replace the utility of the building including warehouse, office and service areas. In deciding on a building which would replace the present utilities of the subject buildings, Mr. Peers inspected the subject buildings to see what areas of the buildings were being used by Moffatt to determine the areas needed for warehouse, service and office space. He inspected similar buildings containing warehouse, service and office space including the building owned by Moffatt's Freight and Express located in the Burnside Industrial Park in Dartmouth, N.S., a building owned by Maritime Storage used to store furniture also located in the Burnside Industrial Park and a truck repair building owned by Nova Enterprises Limited located just outside the boundaries of the Town of Truro. Taking all these factors into consideration, Mr. Peers costed a pre-engineered steel frame building having two sections. The first section contained warehouse and office space and had a building height of 24'. The second section contained a service and truck repair shop and had a building height of 20'. Mr. Peers costed a pitched roof on this building to accommodate the different heights of the two sections. Pages 37 to 39 of Mr. Peers' report contained details on the replacement building costed by him and the cost of that building. The costs used by Mr. Peers in his replacement building were taken from the components of various building models found in Boeckh's

V-Day Manual.

The amount of functional obsolescence is obtained by subtracting the cost of the replacement building from the reproduction cost new of the subject buildings. Mr. Peers calculated the cost of the replacement building to be $1,377,040.00. By subtracting this cost from the reproduction cost new of the subject buildings ($1,907,460.00) Mr. Peers arrived at a figure of $530,420.00 for functional obsolescence or 27.8% of the reproduction cost new of the subject building. The costing of the replacement building and subtracting that cost from the reproduction cost of the building is a generally accepted method used by Appraisers to calculate functional obsolescence.

PHYSICAL DEPRECIATION - MR. PEERS

Mr. Peers calculated the amount of physical depreciation by estimating the percentage of depreciation to be applied to the reproduction cost of each building. He applied depreciation at the rate of 70% to Building No. 1 and the basement areas of Buildings No. 2, 3, 4 and 6; at the rate of 65% to Buildings No. 2, 3, 4 and 6 excluding the basement; at the rate of 60% to the boiler house and part of the garage in Building No. 8 and that part of Building No. 7 which houses the carpenter shop; at the rate of 50% to Building No. 5 and the basement of Building No. 7; at the rate of 40% for the remaining part of Building No. 8; at the rate of 30% for the remainder of Building No. 7 and at the rate of 15% for the loading dock attached to Building No. 7. Mr. Peers applied different rates to parts of Buildings 7 and 8 because portions of this building were improved while other parts were not improved and therefore in worse condition. Mr. Peers did not use one rate of depreciation for all the buildings because he said it would be impossible to show the correct amount of depreciation due to the difference in age and condition of the various buildings. The total amount of physical depreciation calculated by Mr. Peers by applying these percentages to the reproduction costs new of the various buildings was $1,061,267.00.

In estimating the percentage of physical depreciation to be applied to each building, Mr. Peers took into account the age and observed conditions of the building. He also was guided by the depreciation guidelines table found in Boeckh's V-Day Manual and the Hiltz appraisal depreciation table filed as Exhibit M-13, prepared by Mr. Hiltz and himself when they were reviewing the 1981 assessment of the subject property. Mr. Peers said that the rates of depreciation found in the depreciation schedule prepared by Mr. Hiltz and himself were determined through the use of a construction breakdown method. This method involves allowing a different rate of depreciation for each component of the building such as plumbing, heating, partitions, etc., and it takes into consideration the expected life of these components. Mr. Peers said that the depreciation table in Boeckh's does not provide for depreciation in excess of 70% for a building. He said that a building with indicated depreciation of 75% or 80% is not a useable building. In his opinion, the subject buildings, although suffering from considerable physical depreciation, are useable and to allow any more depreciation than he has allowed, would undervalue the property.

Mr. Peers said that he did not use the age-life method (described later in this decision) to calculate physical depreciation because of the age of the buildings and the difficulty in estimating their effective age and remaining economic life. On cross-examination he acknowledged that the age-life method was one method he used to calculate depreciation when he and Mr. Hiltz were reviewing the 1981 assessment of the subject property. He also said that the percentages he arrived at for depreciation for this appeal were supported by the percentages he determined by the age-life method in 1981.

METHOD OF APPLYING DEPRECIATION

The method used by Mr. Peers to calculate the depreciated reproduction cost of the buildings was to reduce the reproduction cost ($1,907,460.00) by an amount for physical depreciation ($1,061,267.00) which results in a residual figure of $846,193.00. Mr. Peers reduced this residual figure by $236,934.00 (28% of $846,193.00) to account for functional obsolescence which results in a depreciated reproduction cost of the buildings of $609,259.00. The amount of functional obsolescence calculated by Mr. Peers at Page 39A of his Assessment Report was $530,420.00 which was 27.8% of $1,907,460.00, the reproduction cost new of the buildings.

Mr. Peers said that in theory, the correct method of calculating the depreciated reproduction cost is to deduct an amount for functional obsolescence from the reproduction cost new of the building and then deduct an amount for physical depreciation based on the value of the building reduced for functional obsolescence. Mr. Peers said that the only reason he removed an amount for physical depreciation first and an amount for functional obsolescence second was because it was easier to calculate the total amount of depreciation in the buildings in this way. Mr. Peers said that he would have arrived at the same figure of $609,259.00 as a depreciated reproduction cost of the buildings if he removed an amount for functional obsolescence first and an amount for physical depreciation second. The reason for this is that he calculated functional obsolescence and physical depreciation as percentages and not as absolute amounts. He said that the end result is the same no matter which percentage is applied first so long as the percentage to be applied second is applied to the residual figure.

CRITIQUE OF MR. PEERS' REPLACEMENT BUILDING

Mr. Omond prepared a critique of Mr. Peers' replacement building which was filed as Exhibit M-26. He listed the following deficiencies in Mr. Peers' replacement building the effect of which understates the cost of Mr. Peers' replacement building thereby reducing the amount of functional obsolescence calculated by Mr. Peers and overvaluing the subject property.

(1) The replacement building does not meet the present useage of Moffatts because it is a 24' high building with 24,500 square feet of warehouse space designed to store 7' containers found in Moffatts Burnside property whereas the subject

buildings only contain a few of these containers. Mr. Omand concludes that the building height of Mr. Peers' replacement building is too high.

(2) Mr. Peers has built functional obsolescence in his replacement building by providing for 5,500 square feet of empty space above the office section (which is located in the warehouse portion of the replacement building).

(3) The building structure costed by Mr. Peers includes costs from a model of a pre-engineered steel building found in Boeckh's Costing Manual as well as costs from a model from a steel frame building. Mr. Omond also notes that the roof costed by Mr. Peers in his replacement building is taken from a different model in Boeckh's Manual than building structure used by Mr. Peers in his replacement building. According to Mr. Omond, the Boeckh system does not allow for this amount of flexibility in substituting components among various building models. In Mr. Omond's opinion it is not possible to construct the reproduction building costed by Mr. Peers and therefore the cost of his replacement building is not reliable.

(4) Mr. Omond said that Mr. Peers' costs would be less if he costed one replacement building with a 24' height rather than costing the building with two sections, one section 24' high and another section 20' high.

(5) Mr. Omond also stated that Mr. Peers' foundation wall cost, interior framing cost, interior foundation cost, slab on ground cost, interior floor finish, interior partition, electrical costs and fire protection costs are too high for reasons stated in his critique.

Mr. Omond said that if Mr. Peers had adjusted the cost of his replacement building to take into account the items he has mentioned, the cost of his replacement building would be $1,123,141.00 and functional obsolescence would be $784,319.00 or 41.1% of $1,907,460.00 and would be closer to Mr. Omond's own estimate of functional obsolescence of 42%.

In reply to Mr. Omond's critique, Mr. Peers said that he constructed a 24' high building to house the warehouse needs of Moffatts because he was advised by Doug Moffatt that 7' wood containers are the proper containers to store furniture and these containers are usually stored three high. Mr. Peers said that the reason that more of these containers are not found in the subject property is because these containers cannot be effectively used in the subject building due to the building's low ceilings. Mr. Peers said that the service section of his replacement building is only 20' high because the extra 4' is not needed in this area and the cost to construct a 24' high building in this area would be greater than the 20' building constructed. He also said that he located the office space in the warehouse section of the replacement building because that is the normal way that these buildings are being constructed today. He said that the open space located above the office area could be used for the storage of files.

Mr. Peers said that his method of constructing a replacement building by taking components from various models found in Boeckh's V-Day Manual is correct and he confirmed this in a telephone conversation with a representative of Boeckh's who is responsible for preparing the models and components found in the Boekh's Costing Manual. Mr. Peers said that his roof costs would be higher if he used a flat roof as suggested by Mr. Omond and not the pitched roof he used. He also said that he costed the replacement building in two parts because this is the correct way to cost a building with two different heights.

Mr. Peers agreed with Mr. Omond's critique about the cost of the concrete slab and plumbing costs and adjusted the cost of his replacement building to reflect Mr. Omond's comments. Mr. Peers disagreed with Mr. Omond's critique on foundation wall costs, interior framing and foundation costs, costs of partitioning between the warehouse area and service area, electrical costs and fire protection costs.

DEPRECIATION - MR. OMOND

Mr. Omond calculated the total amount of depreciation from all causes to be $1,542,290.00. He used two methods to estimate depreciation.

The first method was the age-life method. Mr. Omond described this method at Pages 92 and 93 of his report in the following words:

> "1. Age/Life Method
>
> This is very simply an expression as to the relationship of a building's effective age to its remaining economic life, which together comprise the economic life of the building. The ratio of that effective age to the economic life, when applied to the cost new provides an indication as to the total depreciation from all causes.
>
> ....
>
> Although this is a simplistic approach to the problem, it can be very helpful when dealing with older buildings such as the subject property. Through experience gained in the appraisal and analysis of sales involving other industrial buildings, it is possible to get accurate results from the Age/Life concept, although it is not recommended for students. The Age/Life concept, considers the ability of the building to continue under its present program of utilization without

> large infusions of capital and yet remain competitive in the market place. Both the estimate of effective age and remaining economic life of course are developed from personal observation of the property and from what experience has shown to be reasonable for that particular class of property. This is a "subjective analysis", yet if properly applied, it can be very helpful and is one of the most often used methods. In any event, any of the direct methods of estimating accrued depreciation require subjectivity."

Effective age is defined by Mr. Omond as the typical age of structures with respect to utility and condition. Effective age may be greater or less than actual age and is influenced by the degree of maintenance applied to the structure.

Economic life is defined as the period of time over which the building or structure is expected to contribute to the value of the total property. This period is usually shorter than the physical life of the improvement.

The remaining life is the number of years remaining in the economic life of the building and it is the difference between the economic life and effective age of the structure.

Mr. Omond calculated the amount of depreciation from all causes using this method to be $1,540,339.00 as follows:

Bldg.Nos.	Reproduction Cost	Depreciation Rate	Depreciation Amount
1	$ 222,156.00	85.7%	$ 190,388.00
2,3,4,6	715,224.00	87.5%	625,821.00
5	537,600.00	72.7%	390,835.00
7	326,400.00	81.8%	266,995.00
8	106,080.00	62.5%	66,300.00
	$1,907,460.00		$1,540,339.00

Mr. Omond calculated the depreciation percentage for each building as follows:

Bldg.Nos.	Actual *Economic Life	Actual Age	Effective Age	Economic Life	Depreciation
1	30	140	60	70	60/70 = 85.7%
2,3,4,6	30	66 avg.	70	80	70/80 = 87.5%
5	60	53	40	55	40/55 = 72.7%
7	30-40 (loading dock 25)	40	40-45	55	45/55 = 81.8%
8	25-30	20-30	25	40	25/40 = 62.5%

* Taken from Boeckh's V-Day Manual

At Pages 81 to 87 of his Appraisal Report, Mr. Omond reviewed the condition of the buildings and the assessment of their effective age. At Page 88 of his Report, Mr. Omond gives his estimate of the remaining economic life of these buildings.

The second method used by Mr. Omond to estimate depreciation is similar to the method used by Mr. Peers. This method is found at Pages 118 to 121 of Mr. Omond's report and is cited here in its entirety.

"ALTERNATIVE APPROACH TO DEPRECIATION

> As I have said, a separate estimate as to the total obsolescence inherent in this building could be obtained by deducting the January 1, 1980 replacement cost of a suitable substitute warehouse-office building; absent of all deficiencies and super-adequacies, from the January 1, 1980 reproduction cost - as previously determined. Although we have considered different methods of estimating the replacement cost of our "proto-type" or substitute building, in the final

analysis, we relied on the same two manuals used in consideration of our reproduction cost estimate.

Although our proto-type models were based on 20' high buildings, which we and Moffatts thought would provide them with a suitable replacement, we also costed the models with 24' high buildings. The difference in cost between 20' and 24' high buildings has been expressed in summary in the appropriate cost sections for these models in the Addenda.

In any event, the estimates provided by the "V-Day" manual updated to January 1, 1980 was $1,190,765.00 for a 20' high building and $1,211,941.00 for a 24' high building. The estimate of cost provided by the "BVM" manual was between $991,562.00 for a 20' high building and $1,009,842.00 for a 24' high building, or up to $1,049,082.00 if we cost the more expensive steel frame model, via the BVM Manual.

In view of those estimates, I would estimate the most appropriate "replacement cost" for a suitable replacement building for the Moffatt property at $1,100,000.00 which would more than allow for any minor adjustments.

Based on that, I would estimate the total obsolescence as follows:-

Reproduction Cost New:	
- Existing Buildings	$1,907,460.00
Replacement Cost New	
- Suitable Substitute	$1,100,000.00
Loss In Value From Obsolescence	$ 807,460.00
or 42.3% from all causes	

Having regard for the ages of these buildings, "actual" and "effective" normal life expectancies and so on, my estimate of "physical" depreciation would be in the order of 1 1/4% per year applied to my estimates as to the "effective ages" of buildings 1 to 8 or 66.98% in all, calculated as follows:-

Bldg. No.	Reproduction Cost New	% of Repro. Cost	Effective Age	Physical Depreciation	Depreciation Factor
1	$ 22,156.00	11.6	x 60 yrs.	x 1 1/4%/yr.	8.70
2,3,4, & 6	$ 715,224.00	37.5	x 70 yrs.	x 1 1/4%/yr.	32.81
5	$ 537,600.00	28.2	x 40 yrs.	x 1 1/4%/yr.	14.10
7	$ 326,400.00	17.1	x 40-45	x 1 1/4%/yr.	9.62
8	$ 106,080.00	5.6	x 25 yrs.	x 1 1/4%/yr.	1.75
	$1,907,460.00	100%			66.98%

The 66.98 represents a "composite" percentage estimate of the overall physical depreciation based upon my observations of the buildings, their actual, effective and normal life expectancies, etc.

Alternative Estimate of Depreciation

	Total Estimate of Reproduction Cost New	$1,907,460.00
(a)	Less: Loss from reproduction cost new-due to functional obsolescence etc. as per Page 119 (42.3%)	$ 807,460.00
	Reproduction Cost: Less Functional Obsolescences	$1,100,000.00
(b)	Less: Loss in Value from Reproduction Cost New due to Physical Depreciation = $1,100,000.00 x 66.98% (see p.120)	$ 736,780.00
Final	Depreciated Value of Buildings 1 to 8 using the "Alternative" Approach	$ 363,220.00"

Mr. Omond said that it is not uncommon for industrial buildings to depreciate at the rate of 2% to 3% per year. Mr. Omond analyzed the sales of four industrial properties, described at Pages 100 to 103 of his report (M-17) and reviewed later in this decision, for an indication of the amount of depreciation disclosed by the sales of the properties. According to his calculation, these properties depreciated at the rate of 2% to 3½% per year of effective age. In Mr. Omond's opinion, a rate of 1 1/4 percent per year of effective age is a realistic estimate of physical depreciation in the subject buildings.

The following is Mr. Omond's calculations with respect to depreciation for one of the four buildings he analyzed:

Reproduction Cost Estimate ($23.63 per sq.ft.)		$1,742,453.00
Price Offered	$1,060,000.00	
Land Value	338,000.00	
Building Contribution		722,000.00
Overall Depreciation Suggested Or 58.6%		$1,020,453.00

Age 23 years
Rate of depreciation per year - approximately 2½%

Reproduction cost and land value figures were estimated by Mr. Omond. Mr. Omond said that the price offered had not yet been accepted by the owner of the property, however, he was advised by the owner that the offer was acceptable but had not been accepted because the owner was reconsidering a decision to build a new warehouse and may need the existing property. Mr. Omond said that the above property did not suffer from functional obsolescence or economic obsolescence and there was no need to break down the total amount of indicated depreciation into its sub-categories.

Mr. Omond calculated the rate of depreciation per year for three other industrial properties in a similar way to the above property. According to Mr. Omond, none of these properties suffered from functional obsolescence. However he did break down the depreciation indicated from the sale of these properties between physical depreciation and economic obsolescence. He arrived at an indicated rate of physical depreciation per year of 2%, 2½% and 3½% for these properties.

Mr. Omond's final estimate of depreciation is an average of the depreciation calculated by the age/life method and the alternative method recapped as follows:

Age/life method	$1,540,339.00
Alternate method	$1,544,420.00
Average	$1,542,290.00

RECENT FREE SALE OF THE PROPERTY ITSELF

The subject property is one of several properties owned by Moffatt Brothers Limited which are located throughout Nova Scotia, Newfoundland and Prince Edward Island. Moffatt Brothers Limited is owned by Tignabruaich Holdings Limited. In 1982 Canadian Pacific Express and Transport purchased the shares of

Tignabruaich Holdings Ltd.

Mr. Omond prepared an appraisal of the subject property in April 1982 at the request of Moffatt Freight and Express Limited, which is owned by Moffatt Brothers Ltd. The purpose of the appraisal as stated to Mr. Omond was to provide Moffatts with two estimates of value; one involving the undepreciated replacement cost of the buildingsfor insurance purposes and a second estimate of the market value of the property for financing purposes. In determining the market value of the property for financing purposes, Mr. Omond used the market data method and the cost method. He arrived at a figure of $410,000.00 as market value of the property by the market data method and a figure of $576,000.00 as an estimate of market value by the cost method. The figure of $576,000.00 by the cost method consisted of a value of $327,500.00 for the land and $248,500.00 as a depreciated building value. Mr. Omond used an overall depreciation rate of 90% when valuing the property by the depreciated replacement cost method based on his observations of the building's condition and the depreciation rates indicated from the sale of comparable industrial buildings. Mr. Omond's final opinion of market value was $450,000.00.

Mr. Omond said that he was not aware that his appraisal would be relied upon by Canadian Pacific Express and Transport and Tignabruaich Holdings Limited in negotiating a purchase price for the shares of Tignabruaich Holdings Limited.

Subsequent to the purchase of the shares of Tignabruaich Holdings Ltd., Canadian Pacific Express and Transport allocated the purchase price of the shares among the various assets acquired as a result of the purchase for purposes of preparing the consolidated financial statements of Canadian Pacific Freight and Express Limited. A copy of that allocation was filed as Exhibit M-24. The value allocated to the subject property was $576,000.00 consisting of $327,500.00 for land and $248,500.00 for buildings which are the same values arrived at by Mr. Omond in his cost method.

The subject property was not sold by itself but as part of the Moffatt Enterprise. The sale was also a closed sale and the property was not exposed to the open market and subject to sale on its own. However the sale did take place between two unrelated corporations, one of whom wish to acquire the property and another who wished to dispose of the property with no indication that any party was forced to buy or sell the property.

Mr. Omond said that because Canadian Pacific Express and Transport relied upon his valuation of the property in the purchase of the shares of Tignabruaich Holdings Limited and he was not aware his appraisal would be used for this purpose, his valuation of $450,000.00 should be considered a reasonable indication of the property's market value.

RECENT SALES OF COMPARABLE PROPERTIES

Mr. Omond determined the market value of the subject property to be $460,000.00 using the market data method. This involves estimating the market value of the subject property from sales of property comparable to the subject property.

At Pages 98 and 99 of his report Mr. Omond describes this method and how he utilized it in valuing the subject property.

> "This approach involves the comparison of the subject property with sales of other similar or representative industrial properties. Ideally of course, each of the sales considered would have occurred in the very recent past, be located in the same immediate area and be similar in essential physical aspects such as type of construction, size, building service features and overall utility and condition etc. However, such ideal conditions seldom occur particularly in small areas such as Truro.
>
> We did, nevertheless, investigate and analysis four industrial properties, two involving "closed-sales", one "offer to purchase" and the other an "option to purchase" and relevant aspects or details of those properties have been included on the following pages as Index No.'s 1 to 4. The basis of comparison for industrial properties is usually their sale price per square foot of gross building area, having regard for different building heights. That is to say, one cannot simply compare the sale of one industrial property with another or one industrial property with a subject property without giving consideration to different building heights. So that it is generally beneficial to include a second unit of comparison, namely,

the sale price of the building per cubic foot. This of course considers the overall utility and warehousing or manufacturing capacity of the building.

I recognize that none of the four properties considered here can in any way be considered similar to the subject from the standpoint of construction materials, building type, style, condition or location etc. Nevertheless, these properties as illustrated in the accompanying photographs are all clearly "superior" to the subject from both a physical and functional standpoint. It was my feeling that these properties, all being more modern one-storey industrial facilities would indicate a "higher" unit price than the first floor of the Moffatt property, and therefore if nothing else, they would tend to set the upper limit of value for that aspect of the Moffatt property.

In addition, the analysis of that evidence was helpful in appreciating the large amounts of depreciation inherent in the re-sale of industrial buildings, even when those buildings are relatively new or modern."

The first comparable considered by Mr. Omond was a large food warehouse in Dartmouth which had been appraised by Pat King Appraisals Limited for sale purposes. An offer of $1,060,000.00 was received by the owner on May 17, 1984 but the owner has not yet accepted the offer because it is undecided whether or not it should construct a new warehouse. Mr. Omond said that the owner of the property advised Pat King Appraisals Limited that the offer of $1,060,000.00 was an acceptable offer. Based on a purchase price of $1,060,000.00, Mr. Omond calculated a unit value of $14.37 per square foot of building and .76¢ per cubic foot of gross building area for this property.

The second comparable considered by Mr. Omond was the sale of the Playtex property located in the Amherst Industrial Park in February 1980 for $450,000.00. At the time of sale, this property was a seven year old, one storey masonry and ribbed steel sided building containing 33,986 sq.ft. Based on a sale price of $450,000.00 Mr. Omond calculated the unit value of this building to be $13.24 per square foot and .74¢ per cubic foot.

The third comparable considered by Mr. Omond was an option to purchase for $650,000.00 the former modular home plant in the Amherst Industrial Park in July 1983. This building is a nine year old, one-storey steel frame and steel clad industrial building containing 71,632 square feet and 1,626,320 cubic feet of space. The unit value is calculated on the basis of the option to purchase. The price was $9.07 per square foot and .40¢ per cubic foot.

The fourth comparable considered by Mr. Omond was the 1978 sale of the former Clairtone property in the Westville Industrial Park. This building is a one storey concrete block and steel industrial building with quality office finish. It contains 255,943 square feet of space with an average warehouse height of 16'. It sold in September 1980 for $2,000,000.00 which translates to a unit value of $7.81 per square foot and .49¢ per cubic foot.

At Pages 109 and 110 of his report, Mr. Omond calculated his estimate of market value by this method as follows:

" SUMMARY AND FINAL COMPARATIVE VALUE

In summarizing the foregoing evidence, we find the four properties investigated here suggest the following values:-

Index No.	Suggested Sq.Ft.	Value Per Cu.Ft.
1	$14.77	$ 0.76
2	$13.24	$ 0.74
3	$ 9.07	$ 0.40
4	$ 7.81	$ 0.49

Obviously, most of the subject's value would be in the first floor space, with the secondary value consideration going to the second floor of buildings 1 through 6, and lesser value consideration to other areas.

In any event, I would estimate the "maximum" value of the "Moffatt Property" from a cubic content at $0.35 which when applied to the subject's 1,332,600 cubic feet would suggest a value of $466,410.00.

Conversely, the maximum comparative value of the subject's total first floor space having regard for its limited clearance and other limitations, in my view would be $6.00 per square foot. Based on that, my calculations as to the comparative value of the entire 133,549 square feet encompassing this old, outdated building would be as follows:-

1.	First Floor - Bldgs. 1 to 8 - load dock etc.	
	- 42,361 sq.ft. @ $6.00/sq.ft.	$254,166.00
2.	Second Floor - Bldgs. 1 to 6	
	- 25,658 sq.ft. @ $5.00/sq.ft.	$128,290.00
3.	Third Floor - Bldgs. 4 and 5	
	- 12,035 sq.ft. @ $3.00/sq.ft.	$ 36,105.00
4.	Third Floor - Bldgs. 1, 2, 3 & 6	
	- No "real economic value"	------
5.	Fourth Floor - Bldgs. 2, 3, 4 & 6	
	- No "real economic value"	----
6.	Basement - Bldgs. 1, 2, 3 & 6	
	- No "real economic value"	------
7.	Basement - Bldg. 4	
	- 3,960 sq.ft. @ $2.00/sq.ft.	$ 7,920.00
8.	Basement - Bldg. 7	
	- 8,640 sq.ft. @ $4.00/sq.ft.	$ 34,560.00
	Total - exclusive of land and misc. site improvements (Rounded to $460,000.00)	$ 461,041.00

Mr. Omond gave more weight to the cost approach than the market data approach and concluded that the market value of the subject property as of January 1, 1980 was $475,900.00.

Mr. Peers disagreed with Mr. Omond's appraisal in the following respects:

(1) the age-life method used by Mr. Omond to determine both functional obsolescence and physical depreciation is difficult to apply because of the varying ages of the different parts of the buildings and the extensive amount of functional obsolescence in the buildings. Mr. Peers said

that the buildings are so old that Mr. Omond is only making a judgment call in estimating their economic life, effective age and remaining economic life.

(2) Mr. Omond's final estimate of depreciation was an average figure and the practice of averaging to obtain an amount is not an accepted appraisal method.

(3) It is not correct to lump all forms of depreciation and Mr. Omond was not able to separate the total amount of depreciation determined by the age-life method into an amount for physical depreciation and an amount for functional obsolescence.

(4) The calculations used by Mr. Omond to arrive at land value and building value in his market data method are not included in his report and it is not possible to determine the accuracy or reliability of Mr. Omond's figures or calculations.

(5) The cost of Mr. Omond's replacement building is not accurate because he only costed a building containing an office area and warehouse area and did not include costs for a service area, carpenter shop, tire shop or machine shop.

(6) Mr. Omond did not adjust his cost calculations in his replacement building for differences in the height of his proposed replacement building and the height of the models in Boeckh's Evaluation Manual he used to cost the replacement building.

(7) Mr. Omond incorrectly reduced the cost of the replacement building by an amount for "construction complexity" and "construction grade" which Mr. Peers says are obsolescence factors and should not be used to adjust the cost of a building which is designed not to have any obsolescence.

Both Counsel for the Director and Counsel for Moffatt filed lengthy briefs following the hearing. I wish to commend both Counsel for the thoroughness and the excellent quality of their briefs and while I do not intend to recite extensively all the arguments of Counsel, I will summarize what I feel to be the thrust of their arguments.

At Pages 32 to 35 of her post-hearing brief, Counsel for the Director makes the following arguments:

> " It is submitted that Mr. Peers' evidence should be preferred over that of Mr. Omond. Mr. Omond has a tendency to exaggerate and a tendency to overstate in support of his position. There are inaccuracies throughout his evidence. Finally, there are some difficulties with his approach and methodology, and this makes his result questionable.
>
> In estimating depreciation he used the age life method to determine all forms of depreciation. Because of the difficulties in using this method in this case, and because, we submit, that his conclusions with respect to remaining economic life and effective age are not warranted by the facts, his age life method does not result in a reliable indication of depreciation from all causes.
>
> Mr. Omond calculates physical deterioration by using 1 1/4 percent per year, and functional depreciation by use of his replacement building method. The result of adding the two does not support the result attained through Mr. Omond's age life method.
>
> With respect to Mr. Omond's 1 1/4 percent per year, he bases this on his market approach. We submit that the market approach cannot be used in this case for any purpose whatsoever, and is based on unreliable information not on open market sales similar to the subject but on offers and options respecting properties which are not similar to the subject.
>
> Mr. Omond used the replacement building method but did not use it correctly. Instead of determining what he considered to be a proper replacement building to replace the existing utility of the present

operation, Mr. Omond relied upon some statements made by the owner as opposed to his own investigations and conclusions, but more importantly he did not himself determine a proper replacement building. He picked five replacement buildings, he did not pick the proper height but used two different heights, he did not determine what height was appropriate, he did not have reference to the type of building constructed today for similar purposes. Mr. Peers did all of these things. Therefore, we submit that Mr. Omond's replace buildings, or an average of the five replacement buildings' costs, cannot be accepted by the Board as an appropriate measure of functional obsolescence.

Mr. Peers used an observed condition method to measure physical deterioration, had formerly used a construction breakdown method with Mr. Hiltz, used an age life method as a back up and as a test, and his conclusions from all three support his measure of physical depreciation.

Mr. Peers took a reasonable approach to determining a replacement building in attempting to determine exactly how much space was used, both square footage and cubic footage and how much would be required to replace the present utility of the existing operation. He calculated what height would be required. He calculated what space would be required. He made his own determination of an appropriate size and style of replacement building. He investigated other buildings in Truro and in the Industrial Park in Dartmouth.

There is some disagreement with respect to methodology and in particular Mr. Peers' roof and Mr. Peers' structure for the replacement building, and whether a height adjustment is required in a model having a height different from the actual building. As to the first, both persons talked to people at Boeckhs and we have conflicting evidence on the point. At worst, if Mr. Omond's evidence is accepted and applied to Mr. Peers' building, this increases the total value of the property. As to the second, we say Mr. Peers is clearly correct and Mr. Omond is wrong, and to be wrong in such a crucial factor has a significant effect on the determination of the proper cost of a replacement building.

Both appraisers made various errors which are of less significance. Mr. Peers recalculated those items which he considered he had done an error and we have his corrected figure. Mr. Omond did not correct his calculations and therefore we do not have his corrected figure."

Counsel for the Director also submits that there was no recent sale of the subject property. She argues that there was a sale of shares of a business which owned many properties including the subject property. Subsequent to the sale there was an allocation by the purchaser of the purchase price among the various assets acquired, for income tax purposes, and this allocation should not be considered as evidence of market value of the subject property.

With respect to Mr. Peers' order of applying physical depreciation and functional obsolescence, Counsel for the Director submits that Mr. Peers did not make a crucial error in theory or method which resulted in a different and wrong value. Counsel for the Director argues that the Assessor simply took a short cut in setting out the mathematics in his report.

Counsel for Moffatt argues that the Assessor, Mr. Peers, did not apply the correct principles in valuing property pursuant to Section 38 of the Assessment Act. He submits that Mr. Peers placed too great a reliance on the replacement cost less depreciation method via Boeckh's Manuals and therefore, his result is arrived at "by following a rigid regulation not obtained by a free and unfettered judgment". He argues that since the Assessor did not follow the rules of valuation in forming his opinion, the Board should reject his evidence and should accept the evidence of value put forward by the expert for Moffatts.

Counsel for Moffatt submits that the subject property is a unique and unusual building because of its physical condition and the amount of functional obsolescence; the buildings cannot be rented for storage or warehouse because of the low load bearing capacity of its floors, they no longer meet the purposes of their existing use and the furniture and freight storage industry no longer use buildings with more than one storey. Counsel for Moffatt submits that since the building is unique, the Assessor should have considered other methods of valuation which were available and not just the cost method.

Counsel for Moffatt submits that there is a preferred sequence of approaches to use in estimating property values which have been set out in the Sun Life case (supra) and the Board must give proportional weight in the sequence listed in the Sun Life case to the five methods used to value property. Counsel for Moffatt argues that Mr. Omond used three of the methods (Numbers 1, 3, and 5 listed in the Sun Life case while Mr. Peers used only Method 5).

Counsel for Moffatt also argues that although the sale of the shares of Tignabruaich Holdings Limited, the holding company for Moffatts and the subsequent allocation of the sale price of the shares by the purchaser may not be determinitive or conclusive as to the market value of the subject property, it should be considered as one of the guides in determining the market value of the subject property. Counsel for Moffatt submits that the sale of the shares was not a forced sale. There was a willing buyer and a willing seller in equal bargaining positions. The sale was a sale at arm's length for the market value of the shares which market value has been partly attributed to the subject property. Counsel for Moffatt submits that the breakdown of the sale price of the shares by the purchaser should be considered, not as conclusive or determinitive, but rather as a comparison and reference with other values in determining the final value of the subject property.

Counsel for Moffatt also submits that the Director's expert evidence must be given less weight than the evidence of Moffatts expert.

Counsel for Moffatt submits that the assessor's estimate of physical depreciation is based partly on personal observations of the subject property but mainly on the Hiltz appraisal and Boeckh's Manual whereas Mr. Omond's estimate is based on personal observations in addition to consideration of various market data methods of analyzing depreciation. Counsel for Moffatt argues that Mr. Omond has a broad experience for appraising old multi-storey industrial buildings such as the subject property and his evidence should be given greater weight as to the rate of physical depreciation rather than the assessor's method of determining depreciation essentially from the Hiltz Appraisal and a textbook of recommended levels of depreciation for "separate" buildings of various ages and styles.

Counsel for Moffatt also submits that the assessor applied a wrong principle in estimating functional obsolescence. He argues that the assessor calculated functional obsolescence by the replacement building method at $530,420.00 but in preparing his final summary of value he used a figure of $236,934.00 for functional obsolescence. Counsel for Moffatt argues that the correct principle is that the dollar amount of functional obsolescence calculated by the assessor by the replacement building method must remain constant. Counsel also argues that the assessor applied a wrong principle by deducting physical depreciation first and then deducting an amount for functional obsolescence.

Counsel for Moffatt further submits that the assessor did not cost a true replacement building when he was estimating the amount of functional obsolescence in the subject building. He argues that the purpose of a replacement building being costed is to replace the existing needs of the occupant as they exist at the time of the Assessment and not a building that will meet future needs. Counsel for Moffatt argues that the assessor built into his replacement buildings space to store seven foot containers found in Moffatt's Dartmouth location whereas the subject building only needs space for approximately 50 of these containers. Counsel for Moffatt also submits that the assessor made numerous errors in costing his replacement building as pointed out by Mr. Omond in his critique.

The subject property is a difficult property to value for assessment purposes because of the scarcity of reliable market data on sales and costs. The age of the buildings and their physical condition and functional obsolescence accentuate the valuation problem.

Each of the accepted appraisal valuation methods is deficient in some respects in valuing the subject property. Both Mr. Omond and Mr. Peers agree that the income approach is not an appropriate method to value the property. Both agree that there has not been any recent sale of properties identical to the subject property. A recent sale involving the property was not a sale of the property itself but the sale of shares of a holding company which owns shares in Moffatt which is the owner of several properties including the subject property. Subsequent to the purchase, there was an allocation of the purchase price of the shares among the various assets acquired for purposes for preparing the consolidated financial statements of Canadian Pacific Express and Transport Ltd. The four industrial properties selected by Mr. Omond as comparable sales are not comparable in age, location, size, use or construction. One of the comparables involved an option to purchase the property and the second comparable involved an option to purchase which was not accepted.

The weakness in the cost method is a difficulty in estimating the amount of overall depreciation, especially in the case of very old and obsolete buildings which are the type of buildings being valued here.

Despite the differences in their valuation, Mr. Omond and Mr. Peers agreed on several matters. Both valued the property by the cost method and their final opinion of market value was the value each arrived at by the cost method. In using the cost method, they agreed on the land value, the reproduction cost of the buildings and the value of underground tanks and pumps. Both experts agree that constructing on paper a replacement building to replace the present needs/utility of the subject building, is a generally accepted method to measure the amount of functional obsolescence and both used this method to estimate the amount of functional obsolescence.

The other methods used to value the property by Mr. Omond (direct sale of the property and sale of comparable properties) were used not so much because they produced a determinitive or conclusive indication of market value but they provided some evidence of market value which should be considered in addition to the value determined by the cost method as well as to assist in determining the rate of depreciation to be applied in the cost method.

The Board adopts the replacement cost less depreciation method to value the subject property and determines the market value of the property as follows:

Land Value:		$104,000.00
Building Value:		
Reproduction Cost New	$1,907,460.00	
Less: Functional Obsolescence (27.8%)	530,420.00	
	$1,377,040.00	
Less: Physical Depreciation (66.98%)	922,340.00	$454,700.00
Tanks and Pumps		6,762.00
		$565,462.00
Rounded to:		$565,000.00

The Board accepts the evidence of Mr. Omond and Mr. Peers (who were in agreement) with respect to the value of the land, underground tanks and pumps and the reproduction costs of the buildings. These values are supported by market data and sales of vacant land and by costs from a recognized costing manual. Both experts have experience in the use of costing manuals and each arrived at a reproduction cost for the buildings which was very close to the other's estimate and subsequently they were able to agree on $1,907,460.00 as the reproduction cost of the buildings.

The Board accepts Mr. Peers' evidence on the amount of functional obsolescence which he calculated to be $530,420.00 (27.8% of $1,907,460.00). The Board is satisfied that Mr. Peers prepared a more thorough analysis of the present utility of the subject building than Mr. Omond. Mr. Peers has a better knowledge of the components and cost of his replacement building than Mr. Omond had of his buildings. Both Mr. Peers and Mr. Omond's replacement building are subject to criticism as to the inclusion to certain components and the cost they attributed to these components. In the opinion of the Board it would be difficult for either Mr. Omond or Mr. Peers to construct a replacement building which would not be subject to some criticism along these lines.

Mr. Omond's replacement building appears to be a general approximation of the cost of a 50,000 square foot warehouse with a certain amount for office space. His building does not take into consideration certain aspects of Moffatt's present operation such as the service areas, tire shop, carpentry shop and machine shop.

In the opinion of the Board, Mr. Peers was more particular in determining how much space was needed for each aspect of Moffatt's present operation. The Board finds that the cost for Mr. Peers' replacement building to be a more reliable estimate of the cost to replace the present needs/utility of the subject building than Mr. Omond's estimate.

The Board accepts the evidence of Mr. Omond with respect to the rate of physical depreciation to be applied . Mr. Omond calculated the rate of depreciation to be 66.98% (see page 28 supra). In estimating the rate to be applied for physical depreciation, Mr. Omond relied upon his own observation of conditions of the property. He also took into consideration recent market activity on four industrial properties, three of which were located in small towns in the province such as the subject property. Mr. Peers' estimate of depreciation are also based on his own observations on the condition of the buildings as well as being guided by depreciation tables founded in Boeckh's Costing Manual The Board is satisfied that Mr. Omond has had greater experience than Mr. Peers in appraising old multi-storey industrial buildings such as the subject. The Board is satisfied that Mr. Omond's experience and knowledge of the market with respect to old multi-storey industrial buildings is more likely to arrive at a closer estimate of physical depreciation than Mr. Peers who has relied to a great extent on the suggested guidelines for depreciation found in the Boeckh's Costing Manual.

The allocation of the purchase price of the shares of Tignabruaich Holdings Limited by Canadian Pacific Express and Transport Ltd. to the subject property was $576,000.00 consisting of $327,500.00 for land and $248,500.00 for buildings. While it is difficult to place too much weight on this allocation for purposes of valuing the subject property, it does provide some evidence in support of the value fixed by the Board.

In his post-hearing brief, Counsel for Moffatt suggested that the general level of assessment had not been applied to the subject property for the assessment in 1983 and therefore the assessor did not take into account the concept of uniformity as required by Section 38 of the Assessment Act. Both Mr. Peers and Mr. Omond determined the market value of the property for the 1983 assessment as of January 1, 1980. Neither expert applied the general level of assessment to the market value in arriving at their calculation of the assessed value of the property for 1983.

Counsel for the Director submits that by determing the market value of the property for purposes of the 1983 assessment at January 1, 1980, rather than January 1, 1982, the assessor did have regard to the assessment of other properties in the Town so as to ensure that taxation falls in a uniform manner upon all property in the Town.

All properties in the Town of Truro were reassessed for the 1981 assessment year based on January 1, 1980 market values. These values were carried forward for the 1982 and 1983 assessments. If the January 1, 1980 market value of the subject property were reduced by the general level of assessment for 1983, the assessed value of the subject property would be set at a much lower ratio of its market value than the ratio of the assessed value to market value of other properties in the Town.

If the market value of the subject property for the 1983 assessment year was determined at January 1, 1982 and not January 1, 1980 then the general level of assessment would have been applied to ensure uniformity of assessment with other properties in the Town. In the opinion of the Board, both experts for Moffatts and the Director should have valued the property at January 1, 1982 and then applied the general level of assessment. This appears to be more in conformity with the Assessment Act and the relevant case law than the practice employed here of valuing the property at January 1, 1980.

The Board fixes the assessed value of the subject property for 1983 at $565,000.00.

The Board calculates Moffatt's 1983 business occupancy assessment to be $242,700.00 as follows. Both Moffatts and the Director agree that only 82% of the buildings are being used:

Land Value:		$104,000.00
Tanks & Pumps		6,762.00
Depreciated Building Value	$454,423.00	
Percentage in use	82%	
	372,627.00	372,627.00
Assessed Value of Property Occupied		483,389.00
Applicable rate Section 7(2)(c)		50%
Business Occupancy Assessment		241,695
ROUNDED TO:		$242,700.00

Moffatt shall be entitled to its costs to be taxed on a party and party basis on the County Court Scale by Gerard P. Scanlan of Truro.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 16th day of December, A.D., 1985.

DARRYL W. WILSON

Perry's Pharmacy Ltd. v. Director of Assessment

ASSESSMENT--COMMERCIAL--VACANT LOT--PROPER CLASSIFICATION --BUSINESS OCCUPANCY--JURISDICTION OF BOARD--ASSESSMENT ACT, SS. 1(naa),(nb), 7(1),(2),(3), 23, 25(1),(2), 38 77(1), 83(3), 89(1)(a),(f), 100(1)

This is an appeal from a decision of the Halifax Regional Assessment Appeal Court which confirmed the classification of the Appellant's vacant lot, for the 1985 assessment year, as Commercial Property. The Appellant asked that the lot be reclassified to its pre-1983 classification as residential. The lot is zoned C-2A, a minor commercial zone. The owner contemplates the expansion of its adjacent businesses onto the lot or the sale of the lot as commercial property. The Appellant presently allows its tenants and employees to park on the vacant lot. A former residence on the lot was torn down in 1975.

HELD: The appeal is dismissed without cost.

The Board finds the former intent to use the subject property for residential purposes changed with destruction of the residence on the property. The use of the lot as it is now being used is, in the ordinary sense of the word, "commercial", and this calls for commercial classification of the property for assessment purposes. This is also supported by the zoning and the stated present intention of the owner. As well, the Board cannot class the land as either resource or residential and, since it must classify all property, it must classify the lot as commercial. The Board will exercise its discretion in favour of the taxpayer and not impose a business occupancy assessment. The Board is in doubt as to whether it has any power to impose a business occupancy assessment given the failure of those preceding it in the assessment process to impose such an assessment.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967 c.14 as amended;

- and -

IN THE MATTER OF: An Appeal by Perry's Pharmacy Limited against the decision of the Halifax Regional Assessment Appeal Court hearing dated July 12, 1985 respecting property at 6426 Bayers Road, Halifax, Nova Scotia

BEFORE: RICHARD L. WELDON, Member

COUNSEL: MR. LAURENCE PERRY, on behalf of the Appellant

MARIAN F.H. TYSON, LL.B., on behalf of the Director of Assessment

DECISION

This is an appeal by Perry's Pharmacy Limited, the assessed owner of a vacant lot at 6426 Bayers Road, Halifax, Nova Scotia, from the decision of the Halifax Regional Assessment Appeal Court dated July 12, 1985 confirming the classification for the assessment year 1985 of that lot as Commercial Property. The Notice of Appeal was in the form of a letter dated August 10, 1985 received by this Board on August 16, 1985. In summary, this letter asked that the vacant lot in question be reclassified to its pre-1983 classification which was residential.

The Appellant and the Director, through his counsel, appeared at the hearing which was held at the Expropriations

Compensation Board Room in Halifax, N.S., on November 19, 1985. The Appellant proved the service of the Notice of Appeal. Notice of the Hearing was acknowledged by all parties entitled to receive the same. Counsel for the Director and the agent for the Appellant consented to the Board's jurisdiction which the Board then assumed and proceeded to hear the appeal on its merits.

Mr. Laurence Perry, owner of and the agent for the Appellant, gave the only evidence on behalf of the Appellant. He said that the land at 6426 Bayers Road was an undersized vacant lot, formerly contained a dwelling house, and it was currently zoned C-2A. He said the lot had been bought by the Appellant some years ago. He said various people parked their cars on the lot; himself, the Appellant's tenants from an apartment unit located on the adjacent lot and the Appellant's employees from the pharmacy located under the apartment unit on the adjacent lot. He denied that any of the Appellant's pharmacy customers parked on the lot with the consent of the Appellant, although some might have parked without its consent. He said for the last two months, the Appellant had placed "No Trespassing" signs on the lot. He said the Appellant agreed with the present C-2A zoning and had no intention of changing the C-2A zoning since it may wish, in the future, to use the commercial zoning to expand its existing businesses. He said that direct street access into the lot was poor and that vehicles often gained access from the adjacent lot more conveniently than by direct street access. He said, in summary, that the Appellant was not renting parking spaces, received no money therefor, and that the property was not being used as commercial property. He said for those reasons, the property, for assessment purposes, was clearly residential and should be changed back to that classification which it had had for many years.

Counsel for the Director called Mr. Boyd Algee of Halifax, a Planner with the City of Halifax. Mr. Algee has been employed by the City of Halifax for some 32 years and he testified that the subject property was zoned C-2A, that parking in a C-2A Zone is not a permitted use and therefore, depending on the date of commencement of the present use as a parking lot, the use for parking was either a non-conforming use or an illegal use. He said that somewhere between the years 1950-1982 the lot changed from a residential zoning to a C-1 Zone and then in 1982 the present C-2A Zone had come into effect on the property. C-1 Zoning, he said, was a more general kind of commercial zoning than C-2A and parking would be a permitted use in a C-1 Zone.

The Director's counsel also called the assessor, Mr. Joseph MacLean. He gave evidence as to his qualifications and was qualified before the Board as an expert in assessment matters, competent to give opinion evidence of matters of valuation and classification as it related to the assessment of property in the City of Halifax. He said that the subject property is not yet assessed for business occupancy tax but ought to be. He said that the discrete subject lot being used for parking made the classification of the subject property for assessment purposes a commercial classification. He said the zoning, as well, indicated that it should be classified commercial. In his opinion the use of the property was commercial.

The Exhibit Book, introduced by the Director's counsel into evidence as Exhibit No. 6 through the witness Mr. MacLean, showed that the Appellant had been for several years prior to this appeal, repeatedly appealing its assessment of the subject property.

Sections 25(1) and (2) of the Assessment Act read as follows:

> "25(1) All assessments shall be designated as being residential property, commercial property or resource property, or partly one and partly another.
>
> 25(2) Where a property is in part one of, and in part another one or more of, residential property, commercial property or resource property, the value of each such part shall be entered on the roll."

Under Section 23 of the Assessment Act, the Director shall prepare the Assessment Roll which shows, inter alia, the classification of the property. That classification by the Director (assisted by the assessor) shall be used in valuation under Section 38 of the Assessment Act. Under Section 77(1) of the Assessment Act, any person claiming that his property has been wrongly classified may appeal to the requisite Regional Assessment Appeal Court which may, pursuant to Section 89(1)(f) of the Assessment Act, change the classification of the property. Under Section 100(1) of the Assessment Act, any person aggrieved by the decision of the Regional Assessment Appeal Court may appeal to the Board. The present Appellant has followed the current procedure and thus has arrived at this hearing.

The subject vacant lot is zoned C-2A Commercial, a minor commercial zone. The assessed owner intends to hold to that zoning, commercial. Its present intent, as to its future use of the property, contemplates the expansion of its adjacent businesses onto the lot or the sale of the lot as a commercial property in its entirety. In 1975, the Appellant tore down the residence that originally existed on the property. The Appellant allows its tenants and its employees at the pharmacy to park on the lot without charging them anything extra for parking. The lot is small and those who park with the Appellant's permission use up most of the parking spaces most of the time so that persons not having the Appellant's consent to park would have difficulty in parking on the subject lot. The Appellant reiterates that he is receiving no rent for the use of the property.

Residential property is defined in the Assessment Act Section 1(naa) and reads as follows:

> " "residential property" means property or part thereof used or intended to be used for residential purposes but does not include the portion of a hotel or motel used for the purpose of lodging for the public:"

In this case, the Board finds the former intent to use the subject property for residential purposes changed with the destruction of the residence on the property. The only possible present residential use appearing in the evidence would be as an ancillary parking lot for adjacent residential users. The Appellant's agent did not direct himself or the Board to that point. Counsel for the Director did. Her argument, as understood by the Board, is that parking for hire on a discrete lot is a commercial use of that lot which, being commercial, will require the assessor to class it as commercial. There is mutual benefit ("consideration" in terms of contract law) to the Appellant and to its tenants and to its employees in the granting of parking benefits by the Appellant to its employees and tenants, thus it is commercial in the ordinary sense of the word "commercial". If this argument were not accepted by the Board, she suggested that the use was not residential and it was not resource property. Section 1(nb) of the Assessment Act reads as follows:

> "1(nb) "resource property" means:
>
> (i) farm property;
>
> (ii) forest property owned by a person who owns less than fifty thousand acres of forest property in the Province;
>
> (iii) land of a municipal water utility, excluding any building or structure thereon."

It was not any mixture of the two and thus must be commercial property. Commercial property is the residuary category of the three types of property into which (or a mixture of some combination of the three types) all assessed properties must fit. She cites O'Hearn, C.C.J. in Dartmouth Yacht Club v. The Director of Assessment 32 N.S.R. (2nd) 285 as judicial authority for this interpretation of the Assessment Act.

The Board finds that the use of the lot by the Appellant as it is now being used is, in the ordinary sense of the word, "commercial". A "commercial" use of the subject property calls for commercial classification of that property for assessment purposes. This classification agrees with the zoning. The stated present intention of the owner for future use of the property supports commercial classification of the subject property.

As well, the Board finds that in classifying the property, it cannot class the land as either resource or residential (or any mixture of the two) and therefore, since it must classify all property, it must classify the subject property as commercial.

The agent for the Appellant commended the attention given him in furthering this appeal by the Counsel for the Director and by the Assessor involved.

In the event that the Board dealt only with classification of property and not with valuation in this appeal, counsel for the Director stipulated that, if this appeal failed, the Director would not ask for the imposition of a business occupancy assessment on the subject property.

As stated before, the evidence shows that the assessor had classified the subject property as commercial for assessment purposes. Under Section 7(1) of the Assessment Act, he should have assessed "every person occupying or using a commercial property .... for a sum to be called "business occupancy assessment"". Under Section 7(3) of the Assessment Act, every assessed owner of a commercial property used for parking motor vehicles shall be deemed to be the occupier of the property. The assessor omitted to make such an assessment for business occupancy. It appears that the Director in making his review under Section 83(3) of the Assessment Act, made no move to alter this oversight. The Regional Assessment Appeal Court in this case had as much power as this Board under Section 89(1)(a) of the Assessment Act to deal with the omission in setting a sum as a business occupancy assessment on the occupier of the property, namely the Appellant. It apparently chose not to do so. There was no appeal stated on notice before the Board asking for the imposition of business occupancy assessment. The Board had the same powers as the Regional Assessment Appeal Court as set out in Section 89(1)(a) of the Assessment Act above. If this Section confers on the Board power to grant an increase in the business occupancy assessment from zero percent to the appropriate 50% of the commercial assessment, then it is the opinion of this Board that that power is discretionary and, in view of the representations by counsel for the Director, the Board will exercise its discretion in favor of the taxpayer and not impose a business occupancy assessment on the Appellant.

The Board is in doubt whether, in the absence of an express appeal, it has any power now to impose a business occupancy assessment given the failure of those preceding it in the assessment process to impose such an assessment. Under Section 89(1)(a) of the Assessment Act the Board has the power to confirm the business occupancy assessment. That it cannot do for two reasons, the first reason being that there is no assessment to confirm and the second reason is that if there is one, that figure is zero business occupancy assessment which is illegal or contrary to the Assessment Act and therefore not subject to confirmation. The Board cannot reduce the business occupancy assessment for at least two reasons, first of course, that there is no business assessment to be reduced and secondly, if there is a business occupancy assessment, it is zero percent and there is no provision under the Assessment Act for business occupancy rates of zero percent or for any amount less than zero percent. Can the Board increase the business occupancy assessment? If the business occupancy assessment does not exist, then, of course it cannot be increased, for the Board has been given no express power to impose an assessment for business occupancy. Being in doubt whether there exists a business occupancy assessment of zero percent which the Board might increase to an appropriate level of 50% as required by Section 7(2)(c) of the Assessment Act, the Board repeats its doubt and repeats its discretionary finding under Section 89(1)(a) above and therefore does not impose a business occupancy assessment on the subject taxpayer, the Appellant in this case.

The appeal is dismissed. The Director asked for no costs, therefore no costs are awarded.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of December, A.D., 1985.

RICHARD L. WELDON
Member

MUNICIPAL BOARD DECISIONS

VOLUME FOUR-B/1985

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

R.H. BLOIS, Q.C., — Chairman

ELIZABETH SALTON — Vice-Chairman

RICHARD L. WELDON — Member

DARRYL WILSON, C.A., LL.B. — Member

* * * * *

DOREEN WHITE — Clerk

CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARY AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1985, TO DECEMBER 31, 1985.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

ERRATA

PLEASE NOTE THERE IS AN ERROR IN THE WORDING OF THE KENNETH ROBB V. THE MUNICIPALITY OF THE COUNTY OF HALIFAX DECISION DATED AUGUST 13, 1985. THE ERROR OCCURS ON PAGE 270 (LINE 13) OF THIS VOLUME WHICH IS THE SAME AS PAGE 3 (LINE 13) OF THE BOARD'S ORIGINAL DECISION. THE WORDS "PLANNING ACT" WHICH APPEAR IN LINE 13 SHOULD READ "MUNICIPAL BOARD ACT".

DISCLAIMER RE: HEADNOTES

THIS VOLUME OF THE 1985 DECISIONS OF THE NOVA SCOTIA MUNICIPAL BOARD CONTAINS HEADNOTES WHICH SUMMARIZE THE DECISIONS. THESE HEADNOTES ARE NOT PART OF THE DECISIONS. THE MUNICIPAL BOARD WHILE IT HAS AUTHORIZED AND APPROVED OF THE PUBLICATION OF THESE HEADNOTES ASSUMES NO RESPONSIBILITY FOR THE CONTENT OR THE ACCURACY OF THE HEADNOTES.

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PLANNING--ZONING AMENDMENT--REFUSAL--R-1 TO R-4 TO PERMIT 70 UNIT APARTMENT BUILDING--PLANNING ACT, SS.63(1),(5)--M.P.S. POLICIES P-29, P-30, P-31, P-54, P-62, P-104

This is an appeal from a decision of the Council of the Municipality of the County of Halifax refusing to rezone Lot A8A, a 6,000 sq. ft. approved lot, and a 4.6 acre portion of Lot R2A adjacent to it, from Single Unit Dwelling (R-1 Zone) to Multi-unit Dwelling (R-4 Zone). The purpose of the rezoning application was to permit the construction of a 70 unit apartment building on land-locked lands presently owned by the Nova Scotia Department of Housing, giving street access across Lot A8A. The interior parcel is surrounded by existing single family homes zoned R-1 and some commercial properties zoned C-2 (General Business).

HELD: The Board confirms the decision of Council.

The sole issue in this appeal is whether or not the decision of council reasonably carries out the intent of the Municipal Planning Strategy (M.P.S.). Council must judge each application for rezoning in the light of the policies of the M.P.S., using the expert opinion of its planning staff and the input from the public at the public meeting to ensure that the criteria set out in the M.P.S. are met. Policy P-31 specifically states that "Council may consider amendments...to permit...multiple unit dwellings" in this situation, providing the amendments meet the criteria set out in Policies P-31 and P-104. Two of the criteria in P-31 are "the adequacy of separation distances from low density residential developments" and "the amount of useable open space near the use." These criteria are met by the proposed development, but the Appellant has no obligation to follow the specifics of his current proposal if the lands were rezoned, but only to meet the minimum required by the land-use by-law. Under R-4 zoning a 4.6 acre lot could accommodate 132 units, with a minimum side yard of 17.5 feet and minimum front yard setback of 30 feet. In this case the separation distances from low density residential developments might not be satisfactory. The R-4 zone has no requirement for "open space" but does have provision for an "amenity area." The Appellant proposes 50,000 sq. ft., but only 7,000 sq. ft. are required by the R-4 land-use by-law for 70 units. The Board is also concerned about Policy P-104(iii)(c) relating to traffic generation and access. The controls provided to Council by the Land-use By-law in an R-4 zone are such that the Municipality does not have authority to control these matters of concern. The Appellant has not discharged the onus of proving the decision of Council cannot reasonably be said to carry out the intent of the M.P.S. The mechanism of a development agreement would be an appropriate way to deal with the subject lands if provision had been made for this. The Board recommends the Council consider allowing development agreements in residential infilling situations such as this one in the 5-year review of the M.P.S. required by the Planning Act.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, S.N.S. 1983;

- and -

IN THE MATTER OF: An Appeal by OAKDENE ESTATES LIMITED from a decision of the Council of the Municipality of the County of Halifax made April 30, 1984, which refused to rezone Lot A8A on the south side of Florence Street and a portion of Lot R2A at Lower Sackville from Single Unit Dwelling (R-1) Zone to Multi-Unit Dwelling (R-4) Zone.

BEFORE: ELIZABETH LAWRENCE, Vice Chairman

COUNSEL: PAUL ATKINSON, LL.B., for the Appellant

ROBERT G. CRAGG, LL.B., for the Municipality of the County of Halifax

DECISION

This appeal was heard July 5 and 6, 1984, in the hearing room of the Expropriations Compensation Board, 1660 Hollis Street, Halifax. Pursuant to Section 63(1) of the Planning Act, Oakdene Estates Limited appealed the decision of the Council of the Municipality of the County of Halifax made April 30, 1984, in which Council refused to amend the Municipality's Land-use By-law by rezoning Lot A8A, a 6,000 square foot approved lot, on the south side of Florence Street, and a 4.6 acre portion of Lot R2A adjacent to it in Lower Sackville from Single Unit Dwelling (R-1 Zone) to Multi-unit Dwelling (R-4 Zone).

The Notice of Appeal (Exhibit O-1) dated May 17, 1984, and received by the Board on that date, cited the following grounds of appeal:

> "the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy as outlined in the relevant municipal development plan.
>
> the decision of the council is contrary to the recommendation of the Planning and Development Department of the relevant municipality.
>
> the proposed development would fully comply with the intent of the relevant municipal development plan."

Counsel for the Appellant filed two Affidavits (Exhibits 0-2 and 0-3) indicating that a copy of the Notice of Hearing had been served on certain designated persons and on all assessed owners of land within a distance of 500 feet of the subject property, as required by the Board.

Counsel for the Appellant called five witnesses, Counsel for the Respondent called three. Three area residents attended the hearing and gave evidence.

The stated purpose for the rezoning application by the Appellant was to permit the construction of a 70 unit apartment building on a 4.6 acre portion of Lot R2A of the lands of the Nova Scotia Department of Housing in Lower Sackville. The 4.6 acre portion of Lot R2A is an interior parcel of land northeast of the intersection of Florence Street and Sackville Drive (Highway No. 1) having no street frontage. The intention of the Appellant is to purchase the 4.6 acre portion of Lot R2A from the Department of Housing upon its rezoning to R-4 (Multi-unit Dwelling) Zone and to consolidate it with Lot A8A, an approved residential lot fronting on Florence Street which is owned by the Appellant using Lot A8A as a means of accessing the interior 4.6 acre parcel.

The portion of Lot R2A for which rezoning was requested abuts six single family homes and the vacant Lot A8A located on Florence Street on its northern boundary; seven single family homes located on Kaye Street on its eastern boundary; undeveloped land zoned R-1 on its southern boundary; and three properties, one of which is a portion of Lot R2A located on Sackville Drive and zoned C-2 General Business Zone on its western boundary. The single family homes located on Florence Street and Kaye Street which abut the subject property are all located in an R-1 zone. The 4.6 acre portion of Lot R2A and Lot A8A slope down toward Sackville Drive at a 10% grade. The 4.6 acre parcel is heavily treed; Lot A8A has little vegetation cover.

Counsel for the Appellant called Mr. Arthur Gillespie, President of Oakdene Estates Limited and a resident of Lower Sackville since 1972, who gave evidence on the nature of the company and its plans for the property which is the subject of this appeal. Mr. Gillespie stated that Oakdene Estates Limited buys land and finances and undertakes all the necessary arrangements for projects which are then constructed by a related company, Astik Enterprises Limited. In the past 10 years, Astik Enterprises has built apartment units in Dartmouth, Cole Harbour and Kentville. Of the 70 units proposed for the subject property, 56 are intended to be 2-bedroom apartments and 14 are intended to be 1-bedroom apartments, according to Mr. Gillespie.

The proposed apartment building would be 3-1/2 stories high and would have an elevator. The proposed wood frame building is to be faced with brick and pine he stated, and would be managed, if not owned, by Oakdene Estates after construction.

Mr. Gillespie considered that the subject property had a number of assets which would make it attractive as a location for an apartment building, in particular its proximity to bus routes on Sackville Drive and to banking, shopping and medical facilities across Sackville Drive in the "Bank of Nova Scotia" Mall.

Mr. Gillespie stated that his company planned to leave a 50 foot buffer strip along the north and east boundaries of the 4.6 acre parcel of land which would be conveyed to the abutting Florence and Kaye Street landowners. As well, he stated that any walkways would be fenced and that the total proposed "green area" would be approximately 50,000 square feet although only 7,000 square feet are required by the municipality.

John Emmett, a qualified architect who prepared a "design brief" (part of Exhibit O-8) for Oakdene Estates Limited for the subject site, gave evidence on the details of the proposed apartment development. In a section of the design brief, Mr. Emmett lists "project data" which show a comparison between the Appellant's proposal and the requirements of the multi-unit dwelling (R-4) Zone as follows:

	Actual	Required Under R-4 Zoning
Lot Area	207,345 SF	106,500 SF
Min. Frontage	60 ft.	60 ft.
Min. Front Yard	30 ft.	30 ft.
Min. Side Yard	17.5 ft.	17.5 ft.
Max. Height	35 ft.	35 ft.
Max. Lot Coverage	9.3% (19,200 SF)	50%
Parking	109 spaces	105 spaces
Amenity area	50,000 SF	7,000 SF
No. of units	70	132
Roadways & Parking	24.3% (50,400 SF)	
Open space	66.4% (137,745SF)	

Mr. Emmett stated that he had advised the Appellant that the subject site should not be developed to the maximum design density but rather that the project should be designed to minimize the disturbance to the surrounding community, using the 10% slope of the site and the existing heavy tree cover to achieve that aim. Mr. Emmett's plans show the proposed 70 unit apartment building at the lower (west) side of the subject property, as far away from the residences on Kaye Street as possible (150 feet). According to Mr. Emmett, the roof of the proposed apartment building would be lower than the Kaye Street backyards so that Kaye Street residents would be able to look over the building and retain the views they now have. Residents on Florence Street however, would face the 60 foot wide and 35 foot high gable end of the proposed apartment building approximately 50 to 60 feet from their rear property lines.

Mr. Emmett felt that the subject property was too difficult to develop for single family residential uses because the grade would make road construction and servicing very expensive. He said his design of the 70 unit building used a "staggered" facade over the length of the building to minimize its bulk, that the materials used would be similar to the components of the existing adjacent homes, and that the apartment building would be only 15 feet higher than some of those homes.

Under cross-examination, Mr. Emmett stated that he felt that his design concept for the development was in accordance with the policies of the Municipal Planning Strategy (MPS) but that he relied on Mr. Hanusiak, of the Municipality's Development Division for interpretation of the MPS. Mr. Emmett did not consider that the developer had an obligation to consider school capacity or location for the proposed development - he expected that "planners" would consider that.

Michael Hanusiak, a Planner with the Development Division of the Municipality's Department of Planning and Development, was subpoenaed by Counsel for the Appellant to give evidence. Mr. Hanusiak, who is completing his Masters Degree in Planning from Queen's University and has been employed by the Municipality for 2 years, handled the Appellant's application for rezoning and wrote the Staff Report to Council (Item 4 of Exhibit O-4). The Staff Report, dated February 27, 1984, was written by Mr. Hanusiak after viewing the site. It recommended that the rezoning application be approved.

Mr. Hanusiak pointed out that the subject property was designated "Urban Residential" in the Generalized Future Land use map in the Municipality's Municipal Development Plan for Sackville. The staff report quoting relevant sections of the MDP (Municipal Planning Strategy) is as follows:

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of Plan

"The Urban Residential Designation is designed to recognize the importance of the single unit environment with its associated home business occupations, and yet acknowledge the need for higher density residential and local commercial development. When reviewing proposals for multiple dwelling units it is important to ensure that the units have safe access to public streets and that the proper amenities are available."

Policy P-31: "The avenue by which Council may consider and if deemed advisable, approve the proposed rezoning is set forth under Policy P-31 of the Municipal Development Plan for Sackville:

Notwithstanding Policy P-30, within the Urban Residential Designation, Council may consider permitting low density residential developments which are of a scale and location not inconsistent with existing neighborhoods. In this regard, two unit dwellings may be permitted by amendment to the zoning by-law. In considering such amendments Council shall have regard to the provisions of Policy P-104.

In addition, Council may consider amendments to the zoning by-law to permit rowhouses and multiple unit dwellings. In considering such amendments to the zoning by-law, Council shall have regard to the following:

(i) the adequacy of separation distances from low density residential developments;

(ii) the amount of useable open space near the use;

(iii) that rowhouse dwellings do not gain direct access to individual units from collector roads as identified on the Transportation Map (Map 3); and

(iv) the provisions of Policy P-104."

Policy 104, referred to in Policy P-31, outlines the criteria which Council should consider in assessing applications for rezoning or contract development. Policy 104 states:

> "P-104 In considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following matters:
>
> (i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations;
>
> (ii) that the proposal is not premature or inappropriate by reason of:
>
> a) the financial capability of the Municipality to absorb any costs relating to the development;
>
> b) the adequacy of sewer and water services;
>
> c) the adequacy or proximity of school, recreation and other community facilities;
>
> d) the adequacy of road networks leading or adjacent to, or within the development; and
>
> e) the potential for damage to or for destruction of designated historic buildings and sites.
>
> (iii) that controls are placedon the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:
>
> a) type of use;
>
> b) height, bulk and lot coverage of any proposed building;
>
> c) traffic generation, access to and egress from the site, and parking;
>
> d) open storage;
>
> e) signs; and
>
> f) any other relevant matter of planning concern.

> (iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

The concluding analysis in the staff report is set out in 6 points as follows:

> "The Department of Planning and Development has reviewed the proposed rezoning and is of the position that:
>
> 1. The proposed rezoning is in conformity with the Plan's intent to encourage an eventual mixture of housing stock within the Urban Residential Designation.
> 2. The physical and topographic features of Lot R-2A, coupled with the height restriction of the R-4 Zone (35 feet) will make it difficult to see the proposed structure from the major residential areas along Florence Street and Kaye Street.
> 3. Given that the proposed structure will be located approximately 250 feet from Sackville Drive, its size and shape will not interfere with the established scale of buildings along the commercial corridor.
> 4. With respect to locational requirements, the site's close proximity to schools, recreation and shopping facilities, make it well-suited for multi-unit residential development.
> 5. The Department of Transportation has stated that it has no objection to the proposed access point on Florence Street (Lot A8A). However, staff advise that the applicant be encouraged to provide adequate buffering and storm water protection to the abutting single unit dwellings.
> 6. The Department of Engineering and Works has stated that the trunk sanitary system for the Sackville area was designed based on an average density of 18 persons per acre. Provided that this density figure can be maintained around the area of Cromwell, Florence, and Kay Streets, the Department has advised that it has no objections to the proposed development. Through an investigation of census information for the Sackville area, staff has determined that the proposed number of units will result in an average density of 10.5 persons per acre in this area."

Mr. Hanusiak acknowledged that the abutting Kaye Street properties would probably be affected most by the proposed apartment development but the effect would be primarily a visual intrusion rather than an increase in traffic. A potential walkway exists between civic numbers 216 and 220 Kaye Street which could link the 4.6 acre portion of Lot R2A to Kaye Street. Mr. Hanusiak was unable to predict whether or not the potential walkway which is owned by the Department of Housing would be activated.

Under cross-examination Mr. Hanusiak acknowledged that although he had not been involved with the Public Participation Committee (PPC) from the community of Sackville in the preparation of the Municipal Planning Strategy, he felt that he could interpret the MPS without the assistance of PPC members or others involved in the development of the MPS. Mr. Hanusiak believed that the MPS, having been adopted by Council, is now the"black and white statement" which he and others must operate from and that the role of the Public Participation Committee is over.

Mr. Hanusiak was questioned by Counsel for the Municipality about the meaning of Policy 29 which reads as follows:

> "P-29 Within the Urban Residential Designation as shown on the Generalized Future Land Use Map (Map 1) it shall be the intention of Council to support the existing single unit residential environment with its associated community facility uses, and to provide for a variety of housing in future development."

Asked if Policy 29 did not mean that within the urban residential designation the highest priority was to be given to single family dwellings, Mr. Hanusiak responded that a subsequent policy, P-31, which he had quoted in his Staff Report, allows Council to consider higher residential densities. He emphasized that P-30 states that "Council may consider" higher density development but that residential uses other than single family were not mandatory and were only to be permitted if they would be "of a scale and location not inconsistent with existing neighbourhoods". Mr. Hanusiak stated that he felt Policy 29 should be looked as a whole and together with other relevant policies.

Donald L. Mason, an officer with Planners Atlantic Ltd. was qualified as an expert witness in engineering and urban and rural planning. Mr. Mason had prepared a report (Item 5 in Exhibit 0-8) for the Appellant, analyzing relevant policies of the MPS for Sackville and "the development potential of the R-4 use of the site". Mr. Mason's final recommendation in his report is as follows:

> "RECOMMENDATION: Rezoning to R-4 is a reasonable recommendation, conforms with the intent of the Municipal Development Plan for Sackville, 1982."

Asked if the intent of the MPS was to allow such a project as that proposed by the Appellant, Mr. Mason responded, "In a broad sense, yes". In cross-examination, Mr. Mason agreed that Policies 29 and 30 were relevant to this rezoning application and that they were mandatory for Council to consider although he had not included them in his report.

Mr. Mason agreed that he had been retained after the Council's public hearing and decision on this request to give an opinion on the R-4 use of the subject properties, but he stated that he had considered the merits of R-1 use of the subject lands as well. In his opinion, R-1 development of Lot A8A and a portion of Lot R2A would not be practical because the Florence Street entrance (Lot A8A) was not suitable for a 50 foot right-of-way and pavement width would be less for an apartment entrance driveway. As well he felt that the comparatively small number of single family residential lots which could be achieved, given the requirement for 50 foot roads and the slope of the land, would make R-1 development uneconomic.

Mr. Gordon Gillis, Civic Affairs Chairman of the Sackville Chamber of Commerce, gave evidence for the Appellant on the unanimous motion passed by the Chamber at a meeting on June 27, 1984 (Exhibit 0-9) which reads as follows:

> " Moved that the Chamber adopt a motion of support for a proposal to build a seventy unit Apartment Building and/or Condominium by Oakdene Estates Ltd. in the area between MacDonalds fast food and Kaye St."

The total Chamber membership is approximately 60, Mr. Gillis said, and approximately 37 - 40 were present at the meeting when the above motion was approved. Prior to the passage of the motion, Mr. Gillis stated that Mr. Gillespie of Oakdene Estates Limited had made a presentation to the members. No presentation was made on behalf of County Council and the Chamber had not canvassed the abutting property owners on Kaye and Florence Streets.

Councillor Murdock MacKay gave evidence on behalf of the Municipality. Councillor MacKay represents District 16 in which the subject property is located and is a member of the Planning Advisory Committee. Councillor MacKay objected to the rezoning of the subject land because he felt that the area designated Commercial Core was more appropriate for apartment development and because many area residents were opposed to the rezoning. Of the 123 letters received by him in opposition to the rezoning, all but 2 were from residents in the immediate area of the subject property. Councillor MacKay outlined other concerns of the residents which were increased vehicular traffic on Florence Street, the visual effect of the apartment building from the abutting properties on Florence Street, the effect on adjacent property values, pedestrian traffic from the apartment building, drainage problems from the site and possible transfer of ownership of the building once completed.

Councillor MacKay repeated in cross-examination that he felt that the commercial core should be developed first and that the C-3 (Commercial Core) Zone allowed multiple unit dwellings as a permitted use with no height restrictions (R-4 has a 35 foot maximum height restriction). For the subject site, Councillor MacKay said he would personally prefer commercial use extensions by contract rather than R-4 zoning. The relevant MPS policy governing this is Policy P-62:

> "Notwithstanding Policy P-61, Council may consider permitting new commercial uses or the expansion of existing commercial uses according to the provisions of Sections 33(2)(b) and 34 of the Planning Act in the following locations:

(i) properties fronting on or partially within two hundred feet of the northeast side of Highway No. 1, between the Cobequid Road and Florence Street, provided that no commercial use shall be located within one hundred (100) feet of Kaye Street, Hillcrest Street and Hillcrest Avenue.

(ii) properties fronting on the northeast side of Highway No. 1 between the Beaverbank Road and the Millwood Planned Unit Development boundary.

In considering such agreements Council shall have regard to the provisions of Policy P-104, any objectionable factors of the commercial use, including noise generation or the use of mechanical equipment or other features which may visually or audibly affect abutting residential areas."

Councillor MacKay stated that he had discussed this option with some area residents and believed that there was less opposition to this possibility than to multiple family development on the subject property. In the Councillor's opinion, R-1, Park, Commercial or "contract commercial" were all zoning possibilities more attractive to the area residents than R-4 zoning.

Paul Hyland, a self-employed accountant living in Sackville and a member of the Municipality's Planning Advisory Committee and former Chairman of the Public Participation Committee, gave evidence on the background of the PPC's role in the development of the MPS for Sackville. Mr. Hyland agreed with Councillor MacKay that multi-unit development was more appropriate in the C-3 Commercial Core Zone which is designated on the Generalized Future Land-use map of Sackville. Part of the Commercial Core area is a strip on the northeast side of Highway 1 (Sackville Drive) beginning on the north side of Florence Street and continuing to the Beaverbank Road.

Mr. Hyland pointed out that this area and the more extensive lands designated Commercial Core on the opposite side of Highway 1, were located in close proximity to the subject property for which the Appellant sought rezoning. In cross-examination, Mr. Hyland allowed that the rezoning application for Lot A8A and a portion of Lot R2A complied "legally" with the criteria set out in Policy P-31 but he believed that nevertheless it was not good planning to locate an apartment building behind single family development creating considerably increased traffic in a residential area.

Frank Sutherland, Chairman of the Sackville Advisory Board, gave evidence on the Board's reasons for opposing the rezoning of the subject property to R-4. The MPS describes the Sackville Advisory Board in a chapter entitled "Community Identity" as follows:

> "The Sackville Advisory Board was formed in 1979 to act as an advisory group dealing with local concerns such as fire protection and recreational services. The Board consists of the Councillor and two citizens from each of the five Municipal Electoral Districts in the Sackville area. It is expected that the Board will continue to develop and clearly define its role over the coming years."

There were three principle objections to the rezoning and development proposed by the Appellant, as expressed on behalf of the Advisory Board by Mr. Sutherland. Access to the development would be through an existing residential neighbourhood and the location of the parking lots would not allow adequate buffering from Kaye Street homes it was felt. The Nova Scotia Housing Commission (predecessor to the Department of Housing) had deceived the area residents by showing plans which indicated that parcel R2A would be "green area" Mr. Sutherland said, and the Advisory Board believed that the Department of Housing should not have granted an option to purchase land to the Appellant for purposes of a multi-unit residential development.

In cross-examination Mr. Sutherland stated that even with the 50 foot buffering from abutting residential properties the noise of cars coming and going to and from the proposed upper level parking lot would be disturbing to abutting Kaye Street residents. As well, Mr. Sutherland pointed out that there was no guarantee that development would proceed on the subject lands as proposed by the Appellant. Once rezoned R-4, the only controls over the impact of the development were the maximum and minimum standards imposed by the zoning by-law which could allow,for example, a maximum of 132 units rather than the proposed 70.

Three residents gave evidence in opposition to the proposed rezoning.

Mr. Stephen Berry, who has lived at 198 Kaye Street for the past 2 years, presented the concerns of Kaye Street residents abutting that portion of Lot R2A proposed to be rezoned and some residents on the northeast side of the street - 21 households in all. The concerns of these residents were schooling (elementary school-age children of the neighbourhood currently attending Sackville Centennial School which has additional portable classrooms), noise, pedestrian traffic, insufficient buffering or a concern that additional land when added to the lands of each abuttor would increase abuttor's assessments, garbage storage for the proposed apartment building, and the precedent of rezoning a portion of Lot R2A which might lead to rezoning of the balance of the adjacent R-1 interior land. Mr. Berry stated that the feeling of the area residents was that they did not want apartment buildings in their backyards, that "orderly development" was their goal and that a density of 3 lots per acre was sufficient. To Mr. Berry, the zoning of these subject lands should be R-1 or Parkland with possible "Courtyard" R-1 development acceptable. Mr. Berry stated that the proposed rezoning may be consistent with "the letter of the MDP" (MPS) but was against the wishes of residents of the area and therefore against the spirit of the MPS.

In cross-examination, Mr. Berry agreed that his property did not abut the subject lands, that civic number 176 Kaye Street was an apartment building, that he opposed any extension of commercial zoning back from Highway 1 (Sackville Drive) and that the proposed apartment building was preferable to commercial development of the subject lands.

Roger Ricketts who has resided at 9 Florence Street for two years proported to speak on behalf of residents of Cornwall, Margaret and Florence Streets. Mr. Ricketts said traffic was the principal concern for himself and those he represented, more particularly the volume of traffic on Florence Street which is a main thoroughfare to Raymond Drive as well as Cornwall and Margaret Streets. He stated that the traffic lights at the intersection of Florence Street and Sackville Drive allowed only 6 cars to exit and turn left from Florence to Highway 1 (Sackville Drive) before the light changed, that it was frequently "impossible" to get up the hill on Florence Street in the winter, that the access to the proposed apartment building (Lot A8A) was at the steepest point of the hill, and that there would be restricted visibility for cars exiting from the proposed development because of the steep bank on the uphill (northeast) side, coupled with a blind crest further up Florence Street which would make it difficult to see oncoming traffic. In Mr. Rickett's opinion, Florence Street was the most dangerous street in Sackville and he had a particular concern for the number of young families with small children who lived on the street (Florence Street has no sidewalks). As well, he was anxious about the effect on property values and the possibility of increased litter.

Donald Boland, who lives at 4 Cromwell Street, which runs parallel and north of Florence Street, was also primarily concerned with road safety rather than with the proposed apartment development.

The sole issue in this appeal is whether or not the decision of council reasonably carries out the intent of the

Municipal Planning Strategy. The Board, in coming to a decision on this issue, is limited by Section 63(5) of the Planning Act which states:

> "63(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

Counsel for the Appellant argued that notwithstanding the evidence from those involved in the public participation process about the community's preference for future use of the subject lands, the Municipal Planning Strategy and the intent to be deduced from its policies must be the only criteria by which Council's decision is judged. The lands for which rezoning was requested are designed urban residential in the generalized future land-use map of the MPS, which allowed Council to consider amendments to the land-use by-law to permit multiple unit dwellings (Policy P-31). Counsel for the Appellant stated that the developer met all the criteria set out in Policy P-104, as required by Policy P-31, and that the Council's Planning Advisory Committee which deals with rezoning applications initially and makes recommendations to Council, had not only recommended that Council hold a public hearing on this application but also that Council approve the application. Counsel for the the Appellant contended that Staff recommended the approval of the rezoning because it was "in conformity with the Plan's intent;" that the members of the PAC knew the community concerns, knew the MPS and recommended approval; and that the decision of Council to reject the Appellant's rezoning request was therefore not reasonable.

Counsel for the Municipality argued that although Policy P-31 allowed Council to consider alternative zoning to the R-1 currently assigned to the subject lands, Council was under no obligation to alter that R-1 Zoning unless it considered that there was an acceptable viable alternative. Further, Counsel for the Municipality stated that Council did not have to prove beyond a shadow of a doubt that the proposed rezoning did not carry out the intent of the MPS - the burden of proof was on the Appellant. Council's decision was "not contrary to anything in the MPS" he argued - the intent of the MPS was to encourage multiple unit dwellings in the Commercial Core Zone by allowing them as a permitted use and by a lack of height restrictions on multiple unit dwellings. Counsel for the Municipality argued that the Commercial Core designated area on the Generalized Future land-use was equally close to the amenities as the lands which are subject to this rezoning application. Finally, Counsel for the Municipality stated that "everyone should have known that this land was not intended to be developed" and that the issue was really the "black and white" of the MPS as opposed to the intent of the people."

The Board disagrees with this last statement. As stated in the introduction of the MPS "the purpose of the plan is to guide the decisions of Council in the regulation of physical development and provision of public services and facilities within the Sackville

Plan Area of the Municipality of the County of Halifax." It was generally agreed that the Public Participation Committee of area residents was thoroughly involved in the preparation of the MPS and had primary responsibility for public input to the development of the policies of the MPS. The policies of the MPS, then, having been thoroughly discussed at local committee meetings, by Council, and at formal public hearings, and finally approved by Council and by the Minister, should not be to any significant degree at variance with the "intent of the people."

In the opinion of the Board, Council must judge each application for rezoning in the light of the policies of the MPS, using the expert opinion of its planning staff and the input from the public at the public hearing to ensure that the criteria set out in the MPS are met.

In this rezoning application, the stated intention of the Appellant was to build a 70-unit apartment building on a large interior parcel of land surrounded by existing single family homes zoned R-1 (single unit dwelling) and some commercial properties zoned C-2 (General Business). This is an infilling situation for which there appear to be no specific policies in the MPS under the Urban Residential Designation section. In Section II of the MPS under the heading "sanitary sewer" there is one reference to infilling:

> "Given the cost of new construction and the advantages of an infilling program, the main thrust of the Plan will be to continue development in areas where servicing presently exists".......

The lands which the Appellant wishes to have rezoned are in an area of Sackville serviced with sewer and water.

The policy guidance in the MPS relevant to this rezoning application occurs in the policies previously quoted from the Urban Residential Designation (P-29, P-30, P-31) and the Commercial Core Designation (P-54) together with Policy P-104 which sets out general criteria for amendments to the Land-use By-law.

In a section entitled "Land Use Intent" which describes the various land use designations for Sackville, general descriptions of the intent for the Urban Residential Designation and the Commercial Core Designation occur as follows:

> "The intention of the Urban Residential Designation is to protect the residential environment of the community while allowing for a variety of housing types and other uses which are compatible with continuing residential development.
>
> Within this Designation, single unit dwellings, as well as other associated uses which do not detract from the existing residential environment, shall be permitted. Recognizing that other forms of higher density residential development and certain local commercial uses may be accommodated without general conflict it is the intention of the Plan to provide for such uses in the Urban Residential Designation by amendment to the zoning by-law.".........

> "The intent of the Commercial Core Designation is to create a community area which contains a mix of uses by permitting and encouraging office and retail uses, including shopping centers, government services, entertainment facilities, park and open areas, multiple residential uses and existing residential development."

Both Policy P-31 and the general description of the Urban Residential Designation which makes higher density residential development possible, nevertheless clearly give Council the option to decide whether the proposed rezoning "may be accommodated without general conflict". Policy P-31 specifically states that "Council may consider amendments.... to permit....multiple unit dwellings". (emphasis added). In the opinion of the Board, this does not imply that it is mandatory that Council approve such amendments, but only that Council may consider them, providing that they meet the criteria set out in Policy P-31 and P-104.

Two of the three criteria relevant to this rezoning application set out in Policy P-31 are "the adequacy of separation distances from low density residential developments" and "the amount of useable open space near the use". Both of these criteria are met by the Appellant's proposed development, however, the Appellant has no obligation to follow the specifics of his current proposal for the subject lands if they were to be rezoned, but only to meet the minimum required by the land use by-law.

The minimum side yard setback required under R-4 zoning is 17.5 feet and the minimum front yard setback is 30 feet. Under R-4 requirements, a 4.6 acre lot could accommodate 132 units rather than the 70 proposed by the Appellant. If the maximum allowable 132 units were built on the subject lands, the "adequacy of separation distance from low density residential developments" might not be satisfactory.

The "amount of useable open space" proposed by the Appellant is 137,745 square feet or 66.4% of the total area of the subject property. The R-4 zone requirements do not include provisions for "open space" but require that an "amenity area" of not less than 100 square feet per dwelling unit be provided. An "amenity area" is defined in the zoning by-law as follows:

> "AMENITY AREA means an area of land set aside for purposes of visual improvement or relaxation except where an amenity area is required for any multiple unit dwelling, in which case the area may also include that portion of the building which is devoted to relaxation such as games rooms and balconies."

The amenity area proposed by the Appellant is 50,000 square feet although only 7,000 square feet are required by the R-4 land-use by-law provisions for the 70 units proposed. Once again, the Appellant or any subsequent owner has no obligation to follow the specifics of the current proposal for the subject lands, but only to meet the minimum required by the Land-use By-law.

The third criteria set out in Policy P-31 is "the provisions of Policy P-104". In the opinion of the Board, the majority of the enumerated criteria in Policy P-104 are met by the Appellant's proposed development with the exception of Subsection (iii)(c) which states:

> "That controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of: ....
>
> (c) traffic generation, access and egress from the site, and parking;"

The Department of Transportation apparently had no objection to the proposed access point (Lot A8A) on Florence Street, however, the Staff Report to Council expressed some anxiety about adequate buffering of the access road and storm water protection to the abutting single unit dwellings. As well, the evidence of a Florence Street resident to the Board was that the additional traffic generated by the proposed 70-unit apartment building together with the steep incline of the street at the access point (Lot A8A) could produce dangerous traffic conditions.

Policy P-104 sets out criteria for either amendments to the Land-use By-law or development agreements. If a development agreement were being considered by Council, the Board assumes that controls could be placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reasons of "traffic generation, access to and egress from the site and parking." The Appellant's application to Council was however for an amendment to the Land-use By-law. The only controls which can be applied to these traffic related issues are the requirements of the R-4 zone set out in the Land-use By-law. It appears to the Board that the hazards perceived by area residents of the proposed access point on Florence Street (Lot A8A) and the considerably increased traffic on the street, as well as the staff concerns about buffering of the access road and storm water protection to the abutting single family dwellings, are not within the authority of the Municipality to control.

Having heard the evidence adduced at the hearing and argument by Counsel for both the Appellant and the Municipality, and having visited the site, the Board concludes that the Appellant has not discharged the onus of proving that the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy. Although the Appellant's requested rezoning was recommended by staff and the P.A.C., in the opinion of the Board, Council may legitimately refuse to rezone the subject lands because of concerns raised by area residents which indicate that the proposed development does not meet the intent of the M.P.S. The apartment development proposed by the Appellant attempts to accommodate the concerns of abutting property owners in particular, however, if the subject lands were rezoned to allow multiple unit dwellings, this or any subsequent owner could build a maximum of 132 units rather than the proposed 70 and could reduce the proposed buffer between existing single family abutting homes and the multiple dwelling units. This allowable increase in the number of units which could be constructed on the subject lands would considerably alter the impact on abutting property owners and on area residents.

Although the Appellant's requested rezoning was recommended by staff, it appears to the Board that the recommendation was linked to approval of the Appellant's specifically proposed development for the subject lands. Two of the six points of analysis in the staff report relate to specific aspects of the Appellant's proposed development, as follows:

"2. The physical and topographic features of Lot R2A, coupled with the height restriction of the R-4 Zone (35 feet) will make it difficult to see the proposed structure from the major residential areas along Florence Street and Kaye Street.

3. Given that the proposed structure will be located approximately 250 feet from Sackvilie Drive, its size and shape will not interfere with the established scale of buildings along the commercial corridor."

The Appellant or any subsequent owner of the subject lands is not, however, obligated by the development proposal outlined by the Appellant. A density of development allowed by the requirements of the R-4 Zone might have quite different consequences for abutting landowners than those outlined in Items 2 and 3 of the Staff Report.

The Board has sympathy for the concerns of the existing area residents which appear to have influenced Council in its decision to refuse the requested rezoning. The Board also has sympathy with the Appellant whose development addresses many of those concerns in a responsible way. In the opinion of the Board, the mechanism of a development agreement would be appropriate for the lands which are the subject of the appeal, to accommodate the development of a sizeable interior parcel of serviced land surrounded by existing residential and commercial development. The Land-use By-law for Sackville, however, limits the use of development agreements to the following:

"3.6 (a) Residential care facilities;

(b) Mobile home parks and expansion of existing mobile home parks;

(c) Uses within one hundred (100) feet (30.5m.) of the Little Sackville River which are consistent with uses permitted by zones along the river;

(d) Commercial uses in the vicinity of certain portions of Highway No. 1;

(e) Commercial uses with greater than twenty-five thousand (25,000) square feet (2322 sq.m.) of floor area in the Commercial Core, where such uses border Urban Residential areas;

(f) Commercial uses at the northeast corner of Glendale Drive and Metropolitan Drive;

(g) Industrial uses northeast of the Sackville Industrial Park;

(h) Salvage yards and expansions of the existing yard identified in Appendix "B"."

Policy P-50 and P-51 of the MPS permit development agreements in comprehensive development districts but the minimum size of such districts is 5 acres.

In an appeal pursuant to Section 63 of the Planning Act, Section 63(4) gives the Board the following powers:

> "The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board."

In considering whether the Board should choose to "allow the appeal by instructing the Council to amend the by-law in the manner prescribed by the Board", that is, in effect creating a special zone for the subject lands, the Board took into account the evidence of various witnesses who spoke of the process of developing this MPS. The Board concluded that a Land-use By-law which resulted from widespread public involvement and careful consideration before its adoption only two years previous to this appeal should not be altered in this instance. The Board, however, recommends that Council consider policies allowing development agreements in residential infilling situations such as the one presented in this appeal in the 5-year review of the MPS required by the Planning Act.

For the reasons stated, the Board, pursuant to Section 63(4) of the Planning Act confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of January, A.D., 1985.

E.A. Lawrence

ELIZABETH LAWRENCE
Vice-Chairman

MacDonald v. Town of Westville

PLANNING--ZONING AMENDMENT--RB AND RA TO CA TO PERMIT AUTO REPAIR SHOP--BEST INTERESTS OF THE MUNICIPALITY--INTRUSION OF COMMERCIAL USE IN RESIDENTIAL NEIGHBOURHOOD--CHARTER OF RIGHTS--UNDUE HARDSHIP--PLANNING ACT, SS.63(1),(2),(4),(6),(7)

This is an appeal from a decision of the Council of the Town of Westville refusing to rezone a parcel of land of approximately 5,800 sq. ft. from RB Residential-One Family and RA Residential-Agricultural Zones to CA Commercial-General Zone to permit the Appellant to operate an auto repair shop. The Town does not have a Municipal Planning Strategy.

HELD: The Board confirms the decision of Council.

Section 63(6) of the Planning Act applies to this appeal since there is no Municipal Planning Strategy in effect in the Town. The fact that the Town did on a previous occasion approve a rezoning in the same area from Residential to Commercial to permit a handcraft shop and that the present refusal is to some degree inconsistent with this approval, is not a valid reason for allowing the appeal. Even if, as is alleged, numerous illegal non-conforming uses were permitted to operate in the Town, which was not proven, this would not in itself be reason why the Board should interfere with Council's decision here. Also, because the Town's Zoning By-law does not clearly indicate in what zoning category an auto repair shop falls, that does not make it an obligation of Council to amend the By-law to include "auto repair" as a permitted use. The decision of Council was for the protection of the best interests of the Town, since it protects the basically residential character of the neighbourhood from the intrusion of an incompatible commercial use. The alleged breach of the Canadian Charter of Rights is not a valid ground of appeal and does not have relevance to the question before the Board. The Board, being a statutory body created under provincial legislation, has only those powers given by provincial legislation. This legislation does not enable the Board to render legislation "unconstitutional." In any case, the Appellant was treated fairly and in a reasonable and non-discriminating manner and was not subjected to unusual treatment or punishment. The allegation that the Appellant has suffered undue hardship is a valid ground of appeal by virtue of s.63(7) of the Planning Act, but any hardship suffered by the Appellant was as a result of his own conduct in constructing a garage larger than that authorized in his permit and then using it for business purposes rather than as a private garage. Even in cases where the applicant would suffer "undue hardship" or where "extraordinary and compelling circumstances" prevail, the Board would not be obliged to allow the appeal but rather, as result of the use of the word "may" in s.63(7), the Board has a discretion to exercise in deciding whether to allow an appeal. Not only was the Town's decision justified on sound planning principles, but the Appellant's lot clearly falls short of the minimum lot area and minimum lot frontage for property in a CA Commercial-General Zone.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, chapter 9;

- and -

IN THE MATTER OF: An Appeal by JOHN J. MacDONALD, from the decision of the Council of the Town of Westville made on July 23, 1984, refusing to amend the Town's Land-Use By-law by rezoning a parcel of land approximately 5,800 square feet in size situate north of the Drummond Road in the vicinity of Fox Brook in the Town of Westville from RB Residential One Family and RA Residential - Agricultural Zones to CA Commercial - General Zone to permit the operation of an auto repair shop.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: ROSEANNE M. SKOKE, LL.B, for the Appellant, John J. MacDonald;

BRUCE T. MacINTOSH, LL.B, for the Town of Westville

DECISION

This Appeal was brought under the provisions of Section 63(1) of the Planning Act, S.N.S., 1983, c. 9. The Appellant's Notice of Appeal is dated August 10, 1984, and was received by the Board on August 13, 1984. The Notice of Appeal was received by the Board within the twenty-one day period for service of a Notice of Appeal on the Board under the provisions of Subsection (2) of Section 63 of the Planning Act.

The appeal is from the decision of the Council of the Town of Westville made on July 23, 1984, refusing to amend the Town's Land-Use By-law by rezoning a parcel of land approximately 5,800 square feet in size situate north of the Drummond Road and west of Fox Brook in the Town of Westville, from RB Residential

One Family and RA Residential - Agricultural Zones to CA Commercial - General Zone to permit the Appellant to operate an auto repair shop.

At the commencement of the hearing, Counsel for the Respondent Town indicated to the Board that he had no objection to the Board's jurisdiction to hear the appeal on its merits. The Board therefore assumed jurisdiction and heard the appeal which took place in the Municipal Council Chambers of the Town of Westville, corner of Drummond Road and Queen Street, on November 1, 1984. The hearing occupied one full day.

The Appellant's Notice of Appeal set forth the following grounds of appeal namely:

> 1. The decision of Town Council is inconsistent with the Town of Westville's previous decisions to rezone lands in the Drummond Road area in Westville.
>
> 2. The decision of Town Council is not reasonable and its effect is inconsistent with law. The application of the law to Town residents is not uniform or consistent as numerous non-conforming usages are permitted to operate in the Town of Westville contrary to the Town of Westville Zoning By-law.
>
> 3. The Town of Westville Zoning By-law requires amendment as operation of an auto repair shop does not fall within the specific language of the By-law and therefore it is incumbent upon council to amend the By-law to include auto repair as a permitted use in the Town.
>
> 4. The decision of the Town Council of the Town of Westville is contrary to the best interests of the Town of Westville and said decision offends the rights of the Appellant as provided for in the Canadian Charter of Rights. The Appellant has the right to be treated fairly as other Town residents, in a reasonable and non-discriminating manner and not to be subjected to unusual treatment or punishment, as in this case.
>
> 5. The decision of Town Council is inconsistent with and is unnecessary for the protection of the

> best interest of the Town of Westville.
>
> 6. The Appellant has suffered undue hardship as a result of Council's decision."

Counsel for the Appellant and Counsel for the Town made opening statements. Counsel for the Town in his opening statement indicated that it was his opinion that the Board did not have any jurisdiction to deal with the Appellant's allegation that there was some breach of the Appellant's rights pursuant to the Canadian Charter of Rights. Counsel for the Town also argued that the Board has no jurisdiction to deal with alleged matters of discrimination against the Appellant or as to matters relating to the alleged conflict of interest on the part of some members of the Town Council. Finally, Counsel for the Town argued that the Board should decide the appeal after hearing the evidence on the basis of whether or not the Council's decision was inconsistent with or unnecessary for the protection of the best interests of the Municipality.

Counsel for the Appellant in her opening remarks indicated that she would lead evidence concerning the alleged discrimination by the Town Council against the Appellant and also would lead evidence concerning the alleged conflict of interest on the part of some Council members and would then relate this evidence to the question before the Board as to whether or not the decision of the Council was inconsistent with or unnecessary for the protection of the best interests of the Municipality. On that basis the Board proceeded to hear evidence on the merits.

The Town of Westville does not have a Municipal Planning Strategy although a draft Municipal Planning Strategy has been prepared by the staff of the Pictou County District Planning Commission. This draft had not received any approval as of the date of the hearing and is a preliminary draft only.

Evidence on behalf of the Appellant was given by Melvyn H. Wadden, a Nova Scotia Land Surveyor, Helen R. MacDonald, wife of the Appellant, John David MacKenzie a resident of the Town of Westville, Joseph Coulet, a resident of Westville, Walter Daniel MacDonald, brother of the Appellant and also a resident of the Town and Vance MacLeod the Provincial and Municipal Development Officer for the Town of Westville.

Evidence on behalf of the Town was given by Barbara Richardson who along with her Husband, William Richardson, is the co-owner of the adjacent property on Drummond Road, Richard Spanik the Director of Planning for the Pictou County District Planning Commission, Clyde A. Purvis, the Town Clerk and Treasurer for the Town of Westville, Walter Duggan, the Mayor of the Town and Alexander G. Cyr, a Councillor of the Town of Westville.

The first witness called by the Appellant was Melvyn H. Wadden a licensed Nova Scotia Land Surveyor. He had been retained by the Appellant to survey the Appellant's lands situate to the north of Drummond Road and west of Fox Brook in the Town of Westville. Mr. Wadden stated that the Appellant's property consists of three parcels of land, descriptions for which were prepared by Mr. Wadden and filed as Exhibits W-4, W-5 and W-6. He identified Exhibit W-7 as a legal description of that portion of the Appellant's lands proposed to be rezoned. These lands containing 5850 square feet are shown cross-hatched in blue on a "working sketch" map prepared by Mr. Wadden and filed as Exhibit W-3. This lot is situate approximately 160' north of the Drummond Road. It lies about 70' north of the residence of the Appellant. The southern portion of the lot is zoned Residential One Family (RB) and the northern portion is zoned Residential-Agriculture (RA). Its approximate location is shown marked with a red 'x' on a copy of the Town's Zoning Map filed as Exhibit W-13. Approximately 1000 feet north of the subject land is an industrial park on lands zoned Industrial-General (IA).

The subject lot proposed to be rezoned does not have frontage on a street and access to it would be over other lands originally purchased by the Appellant and his Wife in 1980 or over a parcel of land conveyed by Douglas Cameron and his wife Marilyn to the Appellant and his wife by deed dated June 14, 1984 recorded in the Registry of Deeds at Pictou on June 15, 1984. This deed, a copy of which was filed as Exhibit W-18 conveys a parcel of land running north from Drummond Road to the subject parcel of land along the western portion of the Appellant's other lands. The description in this deed is the same as the description prepared by Mr. Wadden and filed as Exhibit W-4. This parcel of land is shown cross-hatched in pencil on the working sketch filed as Exhibit W-3.

Evidence on behalf of the Appellant was given by Eleanor MacDonald the Appellant's Wife. She and her husband reside at 1192 Drummond Road, in the Town of Westville and are the joint owners of lands purchased in October of 1980. She testified that her husband operated an auto repair shop on a portion of their property on which they pay commercial taxes. She identified four assessment notices for properties she and her husband own in the Drummond Road area of Westville. Three of these assessment notices are for 1983 assessments (W-8, W-9 and W-10) and one is for business occupancy assessment for the year 1982. The three 1983 assessment notices are as follows:

Exhibit W-8	Land Drummond Road	Resource General	$ 500.00
Exhibit W-9	Land off Drummond Road	"	250.00
Exhibit W-10	Land, Dwelling, Building and Business occupancy, 1192 Drummond Road		
		Residential	32,000.00
		Commercial	7,000.00
		Business Occupancy	3,500.00
			$42,500.00
Exhibit W-11	Business Occupancy "Effective start date: October 1, 1982"		$ 1,000.00

Mrs. MacDonald stated that her husband applied to the Town in December of 1982 to have a portion of his property rezoned to C.A. Commercial General. This application was refused by the Council in January 1983. She referred to a draft agreement mailed to her husband and herself by the Town's Solicitor in March of 1983 (Exhibit W-14). This draft agreement prepared by the Town's Solicitor at the request of the Town Council was between the Appellant and his wife as grantors and the Town of Westville as grantee. It recites that the grantors are the owners of certain lands in the Town of Westville upon which "the grantors have erected a private garage which is being used for commercial purposes in violation of the Nova Scotia Planning Act and the Zoning By-laws of the Town of Westville". It further recites that "the grantors have requested of the Town of Westville forebearance in the immediate prosecution of the grantors for such violation."

The draft agreement which does not contain any legal description of the land to be subject to the agreement provides inter alia for a covenant on the part of the grantors not to convey the land without "first exacting from the new owner a covenant not to utilize the said premises in any industrial or commercial manner as a non-conforming use or other than as residential premises, without first having applied for and obtained the necessary statutory and municipal approvals for rezoning said premises to such a zone as is consistent with the intended use of the property".

The draft agreement which was never executed further provides that the grantors "acknowledge any temporary forebearance from prosecution by the grantee shall be without prejudice to its future remedies...". It also provides that the grantors shall not be "entitled to claim any manner of estoppel as against the grantee".

Mrs. MacDonald referred to a second application for rezoning by her husband which was denied by the Town Council on July 23, 1984 and the present appeal is from that decision. She stated that her husband was convicted in July of 1984 for operating a business in the Town contrary to the Town's Zoning By-law.

On cross-examination Mrs. MacDonald identified Exhibit W-15 as her husband's application dated April 28, 1982 for a building and/or development permit to remove an existing garage from 1192 Drummond Road and replace it with a new garage, 30' x 30' in size on a lot 150' x 300'.

Exhibit W-16 is a photocopy of a General Development Permit issued by the Town to the Appellant on April 29, 1982 to "erect a private garage". This permit has endorsed on it a note stating as follows: "This structure is for private use only and not be used for residential or commercial use". The garage actually built is 26' x 50' in size.

Exhibit W-17 is a photocopy of a building permit issued April 29, 1984 to the Appellant giving him permission to "removing existing garage and replacing with a new garage (Private Garage) and for no other use".

Mrs. MacDonald's evidence was that a small garage on the MacDonald property was moved to another site and replaced by a larger garage. Her husband had been doing busines in the old garage from October of 1980. The new garage was completed in December of 1982.

Evidence on behalf of the Appellant was given by John David MacKenzie of 1992 West Street, Westville. His property is zoned for residential use but he has been operating a mobile tire repair business from this property since 1978 and has never been prosecuted under the Town's Zoning By-laws. He had made application to the Town to have his property rezoned but his application was denied. He indicated he has an agreement with the Town respecting the use of his property.

On cross-examination Mr. MacKenzie identified Exhibit W-19 as a photocopy of an agreement he signed on November 13, 1981 wherein he promises the Town Council of the Town of Westville that he "shall not permit any tires, old or new, discarded or otherwise, or any other material or equipment to be in public view on my property at 1992 West Street Westville. I also promise to provide ample parking for my customers". This document is not executed by the Town but is typed on paper bearing the letterhead of the Town of Westville.

Joseph Coulet of 2120 Spring Garden Road in Westville appeared under subpoena and was called to testify on behalf of the Appellant. He is a welder by trade and is employed full time by a Halifax firm. He has a garage on his property which is zoned Residential-Agricultural. He stated that he does some repair welding work in his garage for friends without charge and has been doing this work for twenty years. Mr. Coulet's father is a member of the Town Council of the Town of Westville. He stated that he does not operate a business from his property and has never been prosecuted by the Town for a breach of the Zoning By-law.

Evidence on behalf of the Appellant was given by

Walter Daniel MacDonald a pipe-fitter welder by trade who resides at 2264 Cowan Street in the Town of Westville. He is a brother of the Appellant and circulated a petition in the Town on behalf of his brother in July and August of 1984. He expressed the opinion that his brother was unfairly treated by the Town. He and some friends circulated a number of petitions in support of his brother. These petitions are filed as Exhibit W-20. These petitions contain a considerable number of signatures. The petitions all state as follows:

> "We, the undersigned being the concerned citizens of Westville, hereby wish to protest and object to the recent closure of the Business Premise owned and operatored by JOHN JOSEPH (Dodie) MacDONALD, situate and located at Drummond Road, Westville, and hereby wish to express our displeasure and dissatifaction of the actions of the elected and appointed Representatives of the Town of Westville and/or the Pictou County Planning Commission".

Vance MacLeod, the Municipality's Development Officer was called by the Appellant. He issued a building permit to the Appellant for a private garage and later learned that a commercial operation was taking place on the site. He then advised the Appellant that he was illegally operating a business.

Mr. MacLeod stated that to his knowledge there was only one illegal non-conforming commercial use of property in the Town and that was the property owned by Dave MacKenzie. He had notified Mr. MacKenzie of this illegal use.

Mr. MacLeod said that the Town's Zoning By-law had come into effect in 1968 and there was no Municipal Planning Strategy in effect in the Town. He stated that the only rezoning which had taken place in the area of the subject land related to a rezoning to commercial use of land on Drummond Road opposite the Appellant's land. This rezoning took place in 1977 and the property has since been used as a handcraft shop. He identified fourteen Polaroid photos of properties in the Drummond Road area taken by himself. These pictures were filed as Exhibit W-24. Picture No. 2 shows a handcraft shop on Drummond Road and the other pictures are of residential properties. Pictures No. 12 and No. 13 show the Appellant's dwelling house and garage.

Evidence was given by Barbara Richardson, a six-year resident of 1154 Drummond Road. Her property is immediately adjacent to the MacDonald property on the east. She is opposed to the proposed rezoning of the Appellant's property partly because of the noise factor from the Appellant's garage. She stated the noise has awakened her at night at 10:30 p.m. or later. Her property is zoned residential and she stated that when she moved to her property it was in a quiet area. She thought her property would be devalued by the rezoning of the Appellant's property.

Richard Spanik, the Director of Planning for the Pictou County District Planning Commission was the next witness to be called. He stated that the 1982 application for rezoning covered a larger parcel of land than the second one. It covered land extending to Drummond Road. He said that the minimum street frontage in a C.A. Zone is 120' and the minimum lot area is 12,000 square feet and the property of the Appellant did not meet these requirements.

He indicated that the Town's unwritten policy was to protect the down town commercial area which has a fragile economic base. This policy has resulted in all applications to rezone property in the Drummond Road area from residential to commercial having been rejected by the Town with the exception of the handcraft shop property. This unwritten policy is in accord with his own opinion. He was of the opinion that the subject property was located in an area which is basically residential. He said he would be concerned with a commercial use causing noise in a residential neighbourhood. He stated that Drummond Road is an arterial road between the Town of Westville and the Town of Stellarton on which is located strip residential development.

Mr. Spanik stated that the technical report submitted by the Planning Staff of the Pictou County District Planning Commission to the P.A.C. of the Town on July 18, 1984, had been prepared by Mr. John Merrithew a planner on his staff. This report forms part of Exhibit W-22. He agrees with the report. Mr. Spanik stated that in his opinion it would be bad planning to rezone the subject property to a commercial zone. He also stated that it was bad planning for the Council of the Town to have rezoned the Handcraft Shop property on Drummond Road in 1977.

The technical report given to the Town's P.A.C. recommended that the Town should refuse the Appellant's application. The report points out that staff, after reviewing the surveyor's notes, is of the opinion that the parcel of land does not conform to the requirements of the Westville Zoning By-law.

The following are the planning comments contained in the technical report:

> "An 'auto repair business' is permitted in the Commercial General Use District under '(u)' of section 12 which states:
>
> '(u)' Garage or service station for the purpose of selling gasoline and oils, automobile accessories and the minor adjustment of vehicles, and auto sales'
>
> For such a use, the minimum lot area required is 12,000 square feet. The applicant proposes to rezone an area of 5850 square feet.
>
> For such a use, the minimum frontage required along a public street is 120 feet. It is staff's opinion that neither the area to be rezoned nor the lot or lots on which it is located provides any frontage along a public street. Based on this interpretation of the Zoning By-law, it would appear that a municipal development permit could not be issued for the proposed auto repair shop.
>
> Although, Council is not required to base a rezoning decision on the requirements of the Zoning By-law, it has been staff's position that a rezoning should not be granted by Town Council, where the land to be rezoned cannot be granted a development permit for the proposed use.
>
> In recent years Council has followed an unwritten policy of prohibiting commercial development on the Drummond Road. The basis for this policy comes from the following:
>
> B.(1) The area is predominately residential and local residents have made it apparent at a previous rezoning hearing that they wish the area to remain as such; and
>
> (11) Council feels it is in the best interests of the Town to protect the economic viability of the downtown business area. In order to do this Council feels it is important new businesses locate close to the existing downtown core.

C. The policy described in 'B' (above) has been included in the draft Municipal Planning Strategy now before the Planning Advisory Committee. Although the policies in the Planning Strategy at this point in time, have no effect, the granting of this rezoning would run contrary to the committee's stated position on future commercial development in the Town. Such action would require substantial review of the Planning Strategy and the planning rationale that went into it.

D. The granting of this rezoning would permit a wide variety of commercial businesses to locate on the lot (a list of uses permitted in the Commercial General Zone is attached). This is of particular concern in light of the analysis of the municipal sewage collection system done for the Drummond Road area in 1983. This study indicated that the sewage lift station in the area had only enough excess capacity to accommodate 9 additional residential units (approximately 800 - 900 gallons of sewage per day). Many of the uses permitted in the Commercial - General Zone could place demands on the present quality of service to residents.

Although a commercial use is presently in operation on the site, the Planning Advisory Committee should consider that the granting of this rezoning opens the area to other types of businesses which might have a serious impact on the neighbourhood because of the design or nature of the operation; noise, parking, feature or activity. Neither the existing Westville Zoning By-law nor the proposed Land-Use By-law give Council the ability to grant a conditional rezoning whereby a rezoning can be granted for only one specific use.

E. The operation of an automobile repair shop near surrounding homes creates several land use conflicts. Noise, parking and the outdoor storage of materials has detracted from the appearance of the surrounding neighbourhood. The location of the shop - to the rear of the adjacent residential building's increases the effect of noise on these properties and may significantly reduce the residents enjoyment of their properties. Under the present Zoning By-law, buffers such as landscaping or fencing, are not required by Council. Furthermore, if such requirements were subsequently included in the By-law, they could not be made retroactive and therefore would not apply to the applicant's property.

5. RECOMMENDATION

It is staff's opinion that:

(a) the proposed rezoning cannot conform to the requirements of the Westville Zoning By-law pertaining to the proposed use;

(b) the quality of municipal sewer services to surrounding residents in the area may be compromised by the demands of future commercial developments that may locate on the site; and

(c) that the proposed 'auto repair shop' will have a serious impact on the surrounding residents because of noise and appearance (parking and outdoor storage).

Therefore it is staff's opinion that the Planning Advisory Committee should recommend that Town Council refuse this application."

Clyde A. Purvis, the Town Clerk and Treasurer, was called by the Town's Solicitor. He has held his office since 1973. His personal opinion is that Council made its decision to refuse the Appellant's application for rezoning on the basis of the Staff Report recommending against the rezoning. Mr. Purvis said that the Council, although it didn't wish to rezone the MacDonald property, did wish to assist him and gave instructions to its solicitor to prepare an agreement enabling Mr. MacDonald to be able to carry on his business without having his property rezoned. He was not aware of any discrimination by Council against the Appellant.

Mayor Walter Duggan who has held this office for 21 years, testified that in his opinion there was no discrimination by the Council against the Appellant. He stated that he personally did not vote on the application in question as the Mayor only casts a vote in the case of a tie vote by Council. He said that the Council gave consideration to the P.A.C. recommendation against the rezoning.

The final witness to testify was Alexander G. Cyr, a Town Councillor who resides at 2360 Fox Brook Road. He has served as a Councillor for over 4 years. He said he knew that the Appellant had been carrying on a business on his property for about 4 years. He was aware that David MacKenzie carried on a non-conforming business in the Town.

Subsequent to the hearing of the evidence, Counsel for the Appellant filed a post-hearing memorandum at the request of the Board and Counsel for the Respondent filed a rebuttal submission. The final submission was a rebuttal filed by Counsel for the Appellant with respect to the submission filed by the Respondent. This last submission was received by the Board on December 31, 1984.

Since the Appeal was filed pursuant to the provisions of Section 63(1) of the Planning Act, S.N.S. 1983, c. 9, the Board's determination must be made in accordance with the provisions of subsections 6 and 7 of Section 63 of the Planning Act and these sections read as follows:

> "(6) Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality.
>
> (7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> > (a) the applicant would suffer undue hardship; and
> >
> > (b) extraordinary and compelling circumstances are present."

Subsection (6) applies since there is no Municipal Planning Strategy in effect in the Town of Westville.

The first ground of appeal set out in the Appellant's Notice of Appeal is the allegation that the decision by the Town of Westville refusing to approve the Appellant's application for rezoning is inconsistent with previous decisions of the Town respecting property in the Drummond Road area. This allegation is certainly true in part as the Town did on a previous occasion approve a rezoning of lands located on Drummond Road from Residential to Commercial - General (CA) for the purpose of permitting a handcraft shop type of business. The Board notes the evidence of Mr. Spanik the Director of Planning that the previous approval of the handcraft shop property on the Drummond Road was in his opinion a mistake and was not good planning. The Board agrees with Mr. Spanik that it was not good planning to have approved the rezoning from residential to commercial of the handcraft shop property on the Drummond Road. However, the fact that the Town did rezone the handcraft shop property to Commercial General is not a valid reason why the Town should approve the rezoning of the Appellant's property. No doubt the decision of the Town to refuse to approve the Appellant's property is to some degree inconsistent with its previous decision to approve the rezoning of the handcraft shop property but this inconsistency is not a valid reason for allowing the appeal.

The Appellant's second ground of appeal is that the decision of the Town Council is not reasonable and its effect is inconsistent with law. The Board is of the opinion that there is no validity to ground of appeal number 2 as from the evidence adduced there is in the opinion of the Board no evidence to indicate that the effect of the Town's decision is inconsistent with law or is not reasonable. On the contrary, the Board is of the opinion that the decision of the Town Council is in fact reasonable and the effect of the decision is consistent with the law. Even if it were established that there were numerous non-conforming uses permitted to operate in the Town contrary to the Town's Land-use By-law, which is not the case, this in itself would not, be reason why the Board should interfere with the Council's decision made in good faith in connection with the decision relating to the Appellant's property.

Ground number 3 in the Appellant's Notice of Appeal states that the Town's Zoning By-law (Land-use By-law) requires an amendment as the operation of an auto repair shop "does not fall within the specific language of the By-law and therefore it is incumbent upon Council to amend the By-law to include auto repair as a permitted use in the Town". While it is true that the Town's Zoning By-law (Land-use By-law) does not clearly indicate in what zoning category the operation of an auto repair shop falls, if under any of the existing zoning categories, that does not, in the Board's opinion, make it an obligation of the Council to amend the By-law to include "auto repair" as a permitted use. It is, of course, a privilege of the Appellant or any other resident of the Town to make application to the Town Council to have the text of the Zoning By-law amended so as to specifically provide for the operation of an auto repair shop. The Board notes that in the existing Zoning By-law (Land-use By-law) of the Town filed as Exhibit W-12, there is only one commercial designation and that is Commercial - General (CA). Under the provisions of clause (u) in the CA Commercial Zone permitted uses are "garage or service station, for the purpose of selling gasoline and oils, automobile accessories and the minor adjustment of vehicles, and auto sales". It is a moot question but this category appears to be the only possible category under the Commercial-General Zone which would permit the operation of auto repair work. This category would not appear to include major repairs to vehicles such as would be carried out in an autobody shop.

Ground of appeal number 4 states that the decision of the Town Council is contrary to the best interests of the Town of Westville and in the opinion of the Board that is a valid ground of appeal but on the evidence adduced the Board cannot conclude that the decision of the Town Council was inconsistent with the protection of the best interests of the Town within the meaning of s.s. (6) of Section 63 of the Planning Act. The Board is of the opinion that the decision of the Council was for the protection of the best interests of the Town since it protects the basically residential character of the neighbourhood in which the subject land is situate from the intrusion of an incompatible commercial use. Ground of appeal number 4 also alleges that the decision of the Town Council offends the rights of the Appellant as provided for in the Canadian Charter of Rights. In the opinion of the Board this portion of ground of appeal number 4 is not a valid ground of appeal and does not have relevance to the question before the Board in this appeal which is the question of whether or not the Council's decision was in the best interests of the Town of Westville. In point of fact, from the evidence adduced, it is the opinion of the Board that the Appellant was treated fairly and in a reasonable and non-discriminating manner and was not subjected to unusual treatment or punishment as has been alleged in ground of appeal number 4.

Ground of appeal number 5 is that the decision of the Town Council is inconsistent with and is unnecessary for the protection of the best interests of the Town of Westville and that is a valid ground of appeal but the Board is of the opinion that based on the evidence adduced the decision of the Town Council was consistent with and necessary for the protection of the best interests of the Town of Westville.

Ground of Appeal number 6 is that the Appellant has suffered undue hardship as a result of the Council's decision. The Board acknowledges that ground of appeal number 6 is a valid ground of appeal by virtue of Section 63, subsection (7)(a) of the Planning Act. However, it is the opinion of the Board from the evidence adduced that the Appellant has not in fact suffered undue hardship as a result of the Council's decision. To a large degree any hardship suffered by the Appellant was suffered by his own conduct in making application for a private garage of a stated size and then willfully proceeding without permission from the Town to construct a garage of larger size than that authorized by the permit and then proceeding to use the garage for business purposes and not as a private garage as provided for in the permit, contrary to the Town's Zoning By-law. Because of the Appellant's infraction of the provisions of the Town's Zoning By-law the Appellant was prosecuted and convicted of operating a business illegally under the provisions of the Zoning By-law. To say that the Appellant suffered hardship as a result of the Council's decision in denying his application to rezone would in the opinion of the Board be stretching beyond reasonable imagination the meaning of subsection (7)(a) of Section 63 of the Planning Act.

The Board has come to this decision with respect to the intent of the provisions of subsection (7)(a) with some degree of difficulty. Section 63(6) of the Planning Act provides that where there is an appeal from a decision of a Council with respect to a Zoning By-law in force by Section 112, which is the situation at hand, the Board is prohibited from interfering with the Council's decision unless the decision of the Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality. In this case the Board is strongly of the opinion that the decision of the Council is not inconsistent with or unnecessary for the protection of the best interests of the Municipality. However, subsection (7) of Section 63 provides a further restriction in that notwithstanding the provisions of subsection (6) the Board may allow an appeal by an Applicant if in the opinion of the Board the Applicant would suffer undue hardship. The provisions of subsection (7)(a) of Section 63 create of very real dilemma in this case. On the one hand it is clear to the Board that the Council's decision was consistent with the protection of the best interests of the Municipality. On the other hand the decision of the Council means that the Appellant cannot operate a business on his property which is zoned for residential purposes. The hardship, if any, suffered by the Appellant was not the result of the Council's decision but rather was the result of the Appellant's own wrongful conduct in building an oversized garage and then wilfully carrying on a business contrary to the Town's Zoning By-law. The Appellant acting prudently would have applied for a form of rezoning which would permit him to operate the type of business he wished to operate prior to the construction of his garage and entering into business. If he were successful in his application he could then obtain the necessary permits, erect his garage and proceed to operate the business in question. The Appellant, knowing that he was in a residentially zoned property chose to defy the requirements of the Town's Zoning By-law and constructed an oversized garage building obviously for purposes of using it for a business purpose and then actually entered into a business use of the property.

The Board based on the evidence adduced is of the opinion that there was in fact no discrimination against the Appellant nor has there been demonstrated to the Board from the evidence adduced any evidence of a conflict of interest on the part of any member of the Town Council.

The Board is of the opinion that based on sound planning principles the Town was fully justified in refusing to approve the rezoning application. Not only would a business use of the Appellant's property be a use which is inconsistent with the adjacent residential uses and the general residential character of the neighbourhood but the property in question failed to meet the provisions of the CA Commercial - General Zone of the Town's Zoning By-law in that the subject property contains only 5,850 square feet and this zone provides that the minimum lot area is 12,000 square feet. Also the Zoning By-law states that the minimum lot frontage on a public street must be 120' in a Commercial - General (CA) Zone. Therefore the Appellant's land for which the application to rezone was made clearly falls short of the provisions of the Commercial - General Zone.

The Board notes that from the evidence of Joseph Coulet that he does some welding work in his private garage on land zoned for residential use. He, however, testified under oath that he does not carry on a business or charge for the work he does. In these circumstances it is not for the Board to determine whether or not he is in breach of the Zoning By-law.

While it is a fact that the Town Council did rezone to commercial the so-called handcraft shop property on the Drummond Road opposite the subject property, the evidence of the Director of Planning, Mr. Spanik, is that the decision of the Town with regard to the handcraft shop property may not have constituted good planning. The fact that the handcraft shop property was rezoned is not a valid reason for the Board allowing another property in the Drummond Road area to be rezoned from Residential to Commercial use.

The Board can appreciate and understand the opposition to the Appellant's proposed business use of his property by Mrs. Barbara Richardson, the Appellant's neighbour to the east. There is no question in the Board's opinion that an auto repair business on the Appellant's lands would have an adverse effect on the Richardsons' enjoyment of their residential property. Certainly, Mrs. Richardson's concern about possible noise from vehicles coming to and from the Appellant's property especially at night would be a matter of real concern. There undoubtedly would be a noise factor which would constitute some form of nuisance to the Richardsons. In other words, the proposed use of the subject property would be incompatible with the residential use of the Richardson's property and would also be inconsistent with the other residential uses in the area.

The Board accepts the expert planning evidence of

Mr. Spanik, the Director of Planning. While he spoke of an unwritten policy of the Council to protect the fragile downtown business area by prohibiting commercial rezonings in residential areas of the Town, there was no direct evidence of this policy before the Board. In fact, Councillor Cyr gave evidence that he did not know of any such policy. Mr. Spanik was of the opinion that it would be bad planning however to rezone the subject property to commercial and the Board agrees with him on that observation. Since good planning in the opinion of the Board equates to the best interests of the Town of Westville it would not be in the best interests of the Town to rezone the Appellant's property to a commercial use. Mr. Spanik admitted that in his opinion the Town's decision to rezone the handcraft shop property was bad planning.

The technical report prepared by Mr. J. Merrithew a planner on Mr. Spanik's staff recommended to the Planning Advisory Committee of the Town that the application for rezoning be denied. Mr. Spanik stated that he agreed with the report which was a report which had the approval of the staff of the district planning office.

The Board is in full agreement with two of the three reasons set forth in paragraph 5 of the staff technical report which sets forth the staff's recommendation to the P.A.C. in connection with the Appellant's application for rezoning, namely,

> "(a) The proposed rezoning cannot conform to the requirements of the Westville Zoning By-law pertaining to the proposed use;" and

(c) that the proposed auto repair shop will have a serious effect on the surrounding residents because of noise and appearance (parking and outdoor storage)."

The Appellant contends in his post hearing brief that the Board "must consider the ramifications of the relevant sections of the Canadian Charter of Rights, in light of Planning legislation; municipal by-laws, as well as administrative decision making. There are no restrictions placed on the jurisdiction of the Board to consider and apply the Canadian Charter of Rights to its decision making".

The Appellant further contends that "no person or body of persons is justified in violating an individual's rights. If it can be shown that a Section of Legislation, or a decision of Town Council has the effect of offending the rights of an individual, then the Board has the jurisdiction to render that decision inoperative and to allow the appeal and to render the legislation unconstitutional and make amendments accordingly."

This Board being a statutory body created under legislation enacted by the Province of Nova Scotia only has those powers given to it by provincial legislation and this legislation does not enable the Board to render legislation "unconstitutional" which is a jurisdiction conferred on courts of competent jurisdiction.

The Appellant submits that: "Section 6 of the Charter guarantees an individual the right to earn a livelihood. The failure of Council to allow the application to rezone has in effect deprived the Appellant of his livelihood. This is a violation of Section 6 of the Charter. Applying this Section, it is submitted that the Board has jurisdiction pursuant to s. 63(7) to allow the appeal because of undue hardship, and extraordinary circumstances.

The Appellant further submits that the Town of Westville Zoning By-law which effects the right of individuals to use their property to earn a livelihood is unconstitutional as it offends the rights of an individual as set forth in the Charter. The Appellant submits that this is an appropriate case for the Board to review the Zoning By-law and order its amendment to ensure that it conforms to the rights of individuals as provided for in the Charter.

It is further submitted that an abuse of the process and bias is apparent upon the evidence. The Council's decision to recommend a 'working agreement' rather than re-zone lands is a violation of good planning principles, but more importantly is a violation of the Canadian Charter of Rights.

For Council to prosecute the Appellant for contravention of the By-law and yet condone other illegal non-conforming useages by agreement is also an abuse of the process and bias. To allow a man to work (David MacKenzie) in non-conformance and to cease operations of another (Appellant) is a violation of the Charter of Rights, more particularly Section 7 and Section 12."

The Respondent in its written submission to the Board refers to Section 24(1) of the Canadian Charter of Rights which states "Anyone whose rights or freedoms as guaranteed by this

Charter, have been infringed or denied, may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances". The Respondent submits and the Board agrees with its submission that administrative or quasi judicial tribunals such as this Board are not "courts" of competent jurisdiction to provide remedies pursuant to Section 24(1) of the Canadian Charter of Rights.

The Board derives its jurisdiction and powers by virtue of legislation enacted by the Legislature of the Province of Nova Scotia and in connection with planning appeals that jurisdiction and power must be found within the provisions of the Planning Act, Statutes of Nova Scotia 1983, c. 9, and the Municipal Board Act, Statutes of Nova Scotia 1981, c. 9.

The Respondent in its submission while arguing that the Board is not a Court which can provide a remedy pursuant to Section 24(1) of the Charter of Rights nevertheless refers to Section 6(3)(a) of the Charter which states:

> "The rights specified in subsection (2) are subject to (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence;..".

Subsection (2) of Section 6 of the Charter states that:

> "(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province."

The Respondent then submits that Section 6(3)(a) of the Charter clearly permits a Province to impose zoning restrictions on its residents in a manner set out in the Westville Zoning By-law. The Board agrees with the Respondent's submission on this point.

The Appellant submits at page 19 of the Post-Hearing Memorandum dated November 27, 1984 that "the Town of Westville Zoning By-law which effects the rights of individuals to use their property to earn a livelihood is unconstitutional as it offends the rights of an individual as set forth in the Charter." The Board has no reason to believe that the Town's Land-Use By-law (Zoning By-law) is unconstitutional as alleged by the Appellant. If the Appellant wishes to challenge the Land-Use By-law on constitutional grounds he should do so in a "court" of competent jurisdiction as this Board does not have the jurisdiction to consider the question of the constitutionality of the Land-Use By-law in question.

The Appellant further submits that "an abuse of the process and bias is apparent upon the evidence. The Council's decision to recommend a 'working agreement' rather than rezone lands is a violation of good planning principles, but more importantly is a violation of the Canadian Charter of Rights." It would appear to the Board from the evidence that the Council of the Town in suggesting that the Appellant execute the so-called "working agreement" was an attempt by the council, albeit an ill-advised attempt, to accommodate the Appellant. If this attempt constitutes bias it was a bias in favour of the Appellant rather than against him. The Board is of the opinion that the Council should not have offered the Appellant the opportunity to sign the "working agreement" which in effect is at best an arrangement whereby the Appellant, had he executed the agreement presumably would not have been prosecuted for carrying on a business in clear violation of the Town's Zoning By-law.

The Respondent in its written submission referred the Board to a decision of the Provincial Planning Appeal Board in the matter of an appeal by Maple Leaf Friendship G.R.S. Club from a decision of the Council of the Town of Westville refusing to approve a rezoning of lands in close proximity to the subject property. This decision is reported in Volume 12 page 1661 of the P.P.A. Board Reports. The P.P.A. Board on pages 1668 and 1669 made the following comments which are appropriate to the case at hand, viz:

> "From the evidence given at the hearing it would appear that the Council of the Town, by refusing to rezone the subject property to Commercial - General (CA) made that decision consistent with the protection of the best interests in this Municipality as it would not appear to the Board to be good planning to rezone the subject lands to Commercial - General (CA) since all of the uses listed under that category of zoning would be permissible and in the opinion of the Board most of these uses (eg. warehouse building, theatre, dance hall, garage or service station) would not be compatible with the existing residential uses in the subject area."

While a portion of the Appellant's property was assessed as commercial property and was therefore subject to the payment of taxes on this particular parcel of land under the Town's commercial tax rate, this assessment only came into effect after the Appellant was actually engaged in a busines enterprise on a portion of his property. This would not preclude the Town from enforcing its zoning by-law or in any way legitimize an unlawful business use of property.

The Board having carefully reviewed the evidence adduced at the hearing, having perused the post-hearing submissions of counsel and having visited the subject site is of the opinion, for the reasons stated, that the Appellant has not discharged the onus on him of showing that the decision of the Council under appeal is "inconsistent with or unnecessary for the protection of the best interests of the Municipality" within the meaning of s.s. (6) of Section 63 of the Planning Act, 1983, S.N.S. c. 9. Furthermore, the Board is of the further opinion that this is not a case where the Board should allow the appeal pursuant to the provisions of s.s. (7) of Section 63 of the Planning Act which reads as follows:

> "Notwithstanding subsections (5) and (6), The Board may allow an appeal by an Applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

The Board is not convinced that the Appellant (Applicant) would suffer undue hardship or that extraordinary and compelling circumstances are present. The Board notes that under the wording of s.s. (6) of Section 63 the word "may" appears and not the mandatory word "shall". It thus appears that even in cases where in the opinion of the Board the applicant would suffer "undue hardship" or where "extraordinary and compelling circumstances" prevail the Board would have to exercise a discretion in allowing an appeal and the Board would not be obliged to allow the appeal.

The Board, pursuant to the provisions of s.s. (4)(a) of Section 63 of the Planning Act, S.N.S. 1983, c. 9, confirms the decision of the Council.

And Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of January, A.D., 1985.

RHBlois

R.H. BLOIS, Q.C.,
Chairman.
NOVA SCOTIA MUNICIPAL BOARD.

Century 21 Market Realty Ltd. v. Town of Truro

PLANNING--CONTRACT ZONING--DEVELOPMENT AGREEMENT--REFUSAL--PORTION OF ARCHITECTURALLY SIGNIFICANT BUILDING FOR OFFICE--CONSISTENCY WITH M.P.S.--PLANNING ACT, S.72--TOWN OF TRURO M.P.S. POLICIES P-203, P-204, P-503, P-504, P-505, P-506

This is an appeal from a decision of the Council of the Town of Truro refusing to approve a development agreement to permit the use of a portion of a building on Queen St. in the Town of Truro for a business office. The subject property is in an area zoned Residential/Mixed Use (R-8) and is in the centre of Revitalization Area 2 on the Future Land-Use Map in the M.P.S. It has situate on it a three storey Victorian styled residential building containing four apartment units. The building has two open porches and there is a flat area to the rear suitable for the parking of ten motor vehicles. The proposal is to develop the property in order to conduct a real estate business from the ground floor of the building. The second floor would remain as two residential apartment units.

HELD: The appeal is allowed and the matter is referred back to Council in order for Council and the Appellant to approve and enter into a development agreement.

The issue for the Board is whether Council's decision not to enter into the development agreement with the Appellant cannot reasonably be said to be consistent with the intent of the Town's M.P.S. The Board is obliged not to interfere unless it determines that the Council's decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the M.P.S. The Board has determined that this is the case. The M.P.S. sets out policies intended "to limit the current uses so as to expand, in a controlled fashion, land use possibilities for this area and at the same time preserve this heritage." Council is authorized by M.P.S. Policies P-204(a), P-204(b), and P-204(c) to consider and permit office, professional, medium to high density residential and restaurant uses in the Revitalization Area by way of Development Agreement. The proposed development is the type of use contemplated by the M.P.S. and when implemented in accord with the draft development agreement will have the effect of assisting in the preservation of the Victorian architecture of the building. It therefore meets the intent of the M.P.S. Some residents and property owners within a block of the site object to the proposed development, nevertheless the proposal has been recommended by the Town's planner and P.A.C. The Board accepts the expert testimony of the Town's planner, who recommended approval based on his opinion that the proposed development was in keeping with the intent of the M.P.S.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, c. 9;

- and -

IN THE MATTER OF: An Appeal by Century 21 Market Realty Limited from a decision of the Council of the Town of Truro made on August 6, 1984, refusing to approve an application for a development agreement respecting property situate at #125 Queen Street, Truro.

BEFORE: R.H. BLOIS, Q.C., Chairman,
ELIZABETH LAWRENCE - Vice-Chairman
DARRYL WILSON, C.A., LL.B Member.

COUNSEL: The Appellant, Century 21 Market Realty Ltd. was represented by ARTHUR PAUL WEATHERBY, its Broker/Manager.

DAVID CURTIS, LL.B, appeared on behalf of the Town of Truro.

DECISION

This is an appeal under Section 72 of the Planning Act, 1983, S.N.S., c. 9, by Century 21 Market Realty Limited (hereinafter referred to as the Appellant) from the decision of the Council of the Town of Truro made August 6, 1984, refusing to approve the Appellant's application for a development agreement which would permit the Appellant to use a portion of the building situate at #125 Queen Street in the Town of Truro for a business office.

The grounds of appeal set forth in the Appellant's

Notice of Appeal filed as Exhibit T-1 read as follows:

> "(a) That Council based its refusal to permit the proposed development solely on the basis of "opposition from the area" allegedly evidenced by a petition of certain residents whereas the petition is not representative of the owners of properties which might most reasonably be affected, if at all, by the proposed development; and
>
> (b) the decision is inconsistent with the policy and interest of the Municipal Development Plan of the Town of Truro, in particular P-204(c), P-503 - 506 thereof."

At the commencement of the hearing, Counsel for the Town submitted that ground of appeal (a) is not an appropriate ground of appeal and the only issue of substance set out in the Notice of Appeal is the allegation set out in ground of appeal (b). The Board agrees with Counsel for the Town on this point.

The issue for the Board's determination under Section 72 of the Planning Act is whether the Council's decision not to enter into the development agreement with the Appellant cannot reasonably be said to be consistent with the intent of the Town's Municipal Planning Strategy (M.P.S.).

Section 72 of the Planning Act reads as follows:

> "(1) Where a council has refused to enter into an agreement after application has been made to it pursuant to Section 55 or 56, the applicant may appeal the refusal to the Board.
>
> (2) A decision of the council pursuant to subsection (1) shall provide the applicant with the reasons for the decision.

(3) An appeal pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the decision of the council.

(4) The Board shall not interfere with the decision of the council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall

(a) refer the matter back to the council; and

(b) instruct the council to hold a public hearing in accordance with Section 42, if this had not been carried out prior to the appeal being made by the applicant.

(5) A determination of the Board pursuant to subsection (4) shall contain reasons for the determination.

(6) If the council and the applicant have not approved the terms of an agreement within ninety days of the date of the determination of the Board, or within ninety days of the procedures being completed pursuant to subsection (4), either the council or the applicant may apply to the Board for an order fixing the terms of the agreement.

(7) In an application pursuant to subsection (6), the Board may make any decision the council could have made, except that no order shall be made which commits the council to make any expenditures with respect to the development to be permitted pursuant to this Section.

(8) Where the council has approved the entering into of an agreement pursuant to this Section, the resolution may be appealed by the same persons and in the same manner as for the approval of an agreement under Section 55 or 56, except that the matters determined by the Board pursuant to subsection (4) shall not be reconsidered on the appeal."

The Town of Truro has a Municipal Planning Strategy (M.P.S.), formerly known as a Municipal Development Plan (MDP)

(Exhibit T-3), in effect since June 21, 1983 when it was approved by the Minister of Municipal Affairs. The Town also has in effect a Land-Use By-law, formerly known as a Zoning By-law (Exhibit T-4) approved by the Minister on the same date.

The subject property is owned by the Appellant and is located in a Residential/Mixed Use (R-8) Zone at the corner formed by the North side of Queen Street and the east side of Lorne Street. The property has a frontage of 60' on Queen and approximately 170' on Lorne Street. Located on the subject lot is a three storey Victorian styled residential building containing four apartment units. The main entrance to the building is on Queen Street. The building has two open porches, one facing Queen Street and the other facing Lorne Street and has a flat area to the rear suitable for the parking of ten motor vehicles.

Under the Residential/Mixed use (R-8) Zone, the permitted uses are (1) Single Family Detached Dwelling and (2) Converted Dwelling. The R-8 Zone provides for "special requirements" related to converted dwellings. These are as follows:

> "No development permit shall be issued
> in an (R-8) Residential Zone for the
> converted dwellings of more than (4)
> four dwellingunits".

The detail of the Appellant's proposal for the property is set forth in Exhibit filed as T-6. Basically the proposal is to obtain permission from the Town to develop the property in order to conduct a real estate business from the ground floor of the building. The Appellant's proposal is set forth in the form of a draft agreement which reads as follows:

"1) The Developers are the owners of the lands known as Civic No. 125 Queen Street in the Town of Truro, more particularly described in Schedule 'A' attached hereto (hereinafter called the 'lands'.)

2) The Developers shall maintain the architectural details of the building as set forth more particularly in Schedule 'B' attached hereto, consisting of photographs.

3) (a) The developers shall be responsible for and shall develop and maintain the site in accordance with Schedule 'C' attached hereto, and consisting of a landscape plan, sketches of entrance alterations, and parking layout, and specifically the use of the building shall be restricted as follows:

(i) the cellar for storage; (unchanged)
(ii) the first floor for Real Estate offices
(iii) the second floor for 2 dwelling units (unchanged)
(iv) the third floor as attic (vacant)

(b) The Developers may remove and shall replace trees and shrubs on the said site, subject to the approval of the Truro Tree Commission.

4) The Developers shall be permitted to proceed with and to develop this site in accordance with this agreement, notwithstanding that the site shall contain ten (10) parking spaces, two of which are for residential purposes exclusively. (See Schedule 'C' attached).

5) It is agreed between the Developers and the Town that work on the development of the use of the land will commence not later than forty-five (45) days of the necessary permit and will be completed within six (6) months.

6) Notwithstanding any other provision of this agreement, the Developers shall not undertake or carry out any development on the lands which does not comply with this agreement and with appropriate Town of Truro by-laws, including without restricting the generality of the foregoing, the Building Code

and such provisions of the Zoning By-law as are not affected by this agreement, and no permit shall be issued for any such development.

7) (a) The Town shall issue the necessary permits for the development upon the expiration of the 21-day appeal period under Section 35 of the Planning Act, Statutes of Nova Scotia, 1969, Chapter 16, as the same may be amended from time to time, or upon the withdrawal or dismissal of any appeal which may be taken.

(b) All alterations, repairs or modifications through maintenance pursuant to this agreement to the exterior of building(s) and landscaped shall be subject to the issuance of a development permit whether these alterations, repairs or modifications through maintenance are structural or not.

8) In the event of a breach of this agreement by the Developers, the provisions of subsections (4) and (5) of Section 34 of Chapter 308, R.S.N.S., 1967, as amended, shall apply."

Attached to the draft agreement as Schedule "B" are six photos of the subject building showing (1) front view from east, (2) front view from west intersection of Lorne and Queen Streets, (3) west side Lorne Street, (4) east side from rear and (5) rear of building and (6) parking area in rear of building.

It is to be noted that under the provisions of the draft agreement only the first floor is to be used "for real estate offices." The second floor will remain as two residential apartment units.

Paul Weatherby, the Manager of the Appellant company was the first witness on behalf of the Appellant. He read from a prepared text filed as Exhibit T-5. This prepared text stated that the Appellant's application was for approval of "professional (not commercial) office use of the ground floor level of the property". After stating that the Town

Council refused the application because of "opposition from the area" the text indicates that the subject property is in the centre of Revitalization Area 2 shown on the Future Land-Use Map which forms part of the Town's M.P.S. This "Revitalization Area 2" covers most of the land on both sides of Queen Street between Park Street on the West and Logan Street on the east.

Section 2.3 of the Town's M.P.S. relates to Revitalization Areas I and II and reads as follows:

> "The recently completed 'Railway Relocation Study', among other things, was instrumental in pointing out the significance of Victorian architecture in downtown Truro. These areas have a high use potential and are well preserved, two often conflicting characteristics. The people of the Town of Truro have a great deal of pride associated with these areas as evidenced by the well preserved architecture. Solely residential use of these areas, with respect to architectural preservation has economic problems. Energy costs have put a great deal of pressure on the owner/developer to transform these structures into more energy efficient enclosures and more densely utilized spaces. The high cost of restoration and incorporation of modern energy efficient technologies may be expected only in the very rare cases.
>
> Revitalization areas I and II are identified as being architecturally significant areas. Designating these areas for solely medium density residential uses is seen to be detrimental to this architectural heritage. It is intended here to limit the current uses so as to expand, in a controlled fashion, land uses possibilities for this area and at the same time preserve this heritage."

Policy P-204(a) of the M.P.S. reads as follows:

> "Therefore, it shall be a policy of Council to: Create a Residential Mixed Use Zone permitting single-family residential uses with limited conversion possibilities to a maximum of four (4) dwelling units in

revitalization areas I & II."

Policy P-204(b) of the M.P.S. reads as follows:

> "Therefore, it shall be a policy of Council to: Consider (and may permit) office, professional and medium to high density residential uses of five or more dwelling units in revitalization area I as designated on the Future Land Use Map by Development Agreement only. In evaluating such an Agreement, in addition to criteria outlined in the Implementation part of this Plan, the Developer shall include, for Council's consideration, the following:
>
> > detailed external architectural representations indicating architectural preservation and/or continuity to be maintained and shall include:
> >
> > > building plan(s) and details
> > > building elevations
> > > landscaping plan(s)
> >
> > architectural representations may consist of photographs, drawings or similar graphic means.
>
> Council may consult its own architectural advice should circumstances warrant such professional consideration."

Following the text of Policy P-204(b) the M.P.S. reads as follows:

> "Revitalization Area II - (See Future Land Use Map)
>
> Revitalization II has been created to allow restaurants in areas adjacent to arterial streets as indicated on the Future Land Use Map, in addition to professional, office and medium to high density residential uses by Development Agreement only."

Policy P-204(c) of the M.P.S. reads as follows:

> "Therefore, it shall be a policy of Council to: Consider (and may permit) in addition to Policy 204(b) above, restaurant uses in revitalization area II as designated on the Future Land Use Map and subject to the same

criteria as Policy 204(b) above."

Under Part V of the M.P.S., implementation policies are set forth. Section "F" at page 95 of Part V refers to "Development Agreements" and reads as follows:

> "During the past few years the Town of Truro has worked with a Municipal Development Plan and Zoning By-law affording the Town the opportunity of dealing with growth and development in a predetermined fashion. This experience has enlightened Council to the fact that it is difficult to preconceive all forms of potential development which may be desirable in the town especially developments which are large and have a potential for substantial impact on the existing infrastructure. There are many examples which have occurred which make this situation all the more evident. Granted, many of these examples are overcome by this plan and by-law; however, there remains certain rare types of development which defy the application of standard zoning techniques and have a more profound impact on the community than a plan may consider.
>
> Often, regardless of whether these developments can be accommodated by standard planning procedures and zoning techniques, there are no assurances that the development will maintain all of its displayed characteristics, the result being that major projects may adversely affect the integrity of a segment of the community. In other situations minor variance (Section 44 of The Planning Act) may be too limited to permit a development which on the whole would be desirable. These and other situations have occurred and probably will occur. If it is desirable to have urban renewal or to maintain quality environments within the community it is desirable to have the flexibility to deal with major developments in a controlled fashion through Development Agreements [as provided for in (Section [33(2)(b)] and Section [44(14)] of The Planning Act). The Evaluation of Development Agreements.
>
> It is clear that Development Agreements should be used with discretion. It would not be desirable for Council to be dealing with all developments in this fashion as the time and cost, both monetary and in administration, would be prohibitive.

Therefore, it is the intention of this plan to deal with those developments of a large scale by Development Agreements as outlined in this Plan, and only then at Council's discretion.

Therefore, it shall be the policy of Council to:

P-503 - Consider (and may permit, consistent with this plan) developments, which may not otherwise be permitted by the Zoning By-law, only by agreement pursuant to Section 33(2)(b) and Section 34(1) of The Planning Act.

P-504 - In evaluating a proposal for a development by Development Agreement Council shall have regard for, but shall not be limited to, the following matters:

1.. The impact of the proposed development on:

(i) abutting land uses
(ii) municipal services
(iii) pedestrian and motor traffic.

2. The suitability and availability of other appropriate sites in town for the proposed use.

3. Comments arising from a public hearing on the proposed development.

4. The submission of a site plan showing the location and scale of the structures on the lot, parking areas, landscaping, and building plans showing the nature and design of the proposed structure.

P-505 - Hold a public hearing prior to entering any agreement. Procedures for public notice and hearing shall be the same as those required for zoning amendments as outlined in Section 38 of The Planning Act.

P-506 - Include in any agreement made pursuant to Section 34 of The Planning Act terms and conditions necessary to ensure that the development is consistent with the policies of this plan. The agreement shall include, but shall not be limited to, some or all of the following:

(i) The specific use and size of the structure whether new, or an expansion, or renovation of an existing structure is proposed.

(ii) The compatibility of the structure with adjacent uses in terms of design.

(iii) The compatibility of the site, in terms of landscape design, with adjacent uses.

(iv) Provision for adequate buffering to screen the development from adjacent and dissimilar land uses which conform to this Municipal Development Plan.

(v) Provision for adequate setbacks from adjacent land uses.

(vi) Any matter which may be addressed in the Zoning By-law.

(vii) Time limits for the initiation and completion of construction (and may include phased construction).

(viii) The provision of services and utilities. Flood damage reduction controls with regards to possible floodplain development.

(x) Any other matter which Council feels is necessary to ensure the general compatibility of the use and structure with adjacent uses and structures."

The Appellant's written submission (T-5) states at page 3 that:

> " A letter from the Heritage Advisory Committee to the Town Plan Advisory Committee, in favour of the proposed development, was presented to Council by Century 21. Prior to the public hearing, the Town Plan Advisory Committee acting in an advisory capacity to the Town Council, approved the development. It is noteworthy that several of the members of the Town Plan Advisory Committee are also members of the Town Council. Further, the Town Planner who is in favour of the development and who was present at the Town Council meeting, was not consulted at the meeting by the Town Council as to the advisability of the development."

The Appellant's written submission states at Pages 5 and 6 that:

> " Queen Street is presently a mixed-use area including professional, office, retail, special housing, church, industrial, multi-unit residential (including apartment blocks) as well as

> some single family dwelling uses. The proposed development would not encourage commercial, but professional development which is the intent of the Municipal Development Plan, in relation to Revitalization Area II.
>
> The proposal presented to Town Council is designed to allow restoration of the deteriorating property and to create prestigious offices for Century 21's real estate operations in Truro, following the tradition of other local firms including Fundy Agencies on Elm Street, C.D. Armstrong on Dominion Street (contract zoning) and Burchell, MacDougall and Gruchy, law firm on Prince Street, and at the same time preserving a Victorian styled landmark.
>
> The proposal includes a sign which has been designed as recommended by the Town Plan Advisory Committee. The proposal does not include the removal of the stately Elm trees on the property, and in addition, the parking area has been designed to conform with the streetscape plan of the Town, and to alleviate any traffic congestion associated with the proposed use of the building.
>
> The redesign and relocation of the existing entrance and exterior upgrading contained in the proposal are in accordance with designs and specifications prepared by an architectural firm, to compliment the Victorian style of the building."

Mr. Weatherby introduced and identified an L.R.I.S. map No. 5Q06-27NW filed as Exhibit T-7. This map shows an area of the Town of Truro roughly bounded on the east by Waddell Street and on the west by Park Street. The subject property is located approximately in the middle of this area and is marked with a red dot on Exhibit T-7. Mr. Weatherby stated that the thirteen properties marked in yellow on this map indicate the residences of those persons who were opposed to the Appellant's proposed development and who had signed a petition to indicate their opposition. This map shows the properties that are within 500' of the subject property by means of a solid red line. Another dotted red line indicates properties that are within 800' of the subject property. This map indicates by virtue of being coloured yellow the location of property owners opposed to the development. Four of these owners including the owners of the adjacent property to the east of the subject property, known as Civic No. 129 Queen Street are located within the 500' area and an additional nine are included in the extended 800' area.

Mr. Weatherby pointed out that Mrs. Helen MacLellan who has resided in the adjoining property at #129 Queen Street for 40 years and who at the time of the public hearing before Council had criticized certain aspects of the proposed architectural changes to the subject building was living in a Victorian house the exterior of which is covered in unauthentic asbestos siding. He also indicated that her dwelling had an addition to it in the rear in 1983 to provide an apartment unit which Mr. Weatherby described as "clearly not an attempt to preserve the original architectural features of the Victoria home, but a major alteration." He also pointed out that "Queen Street is presently a mixed-use area including professional, office, retail, special housing, church, industrial, multi-unit residential including apartment blocks as well as some single family dwelling uses."

Mr. Weatherby also pointed out that part of the Appellant's proposal for the development of the subject property included the erection of a 4' x 1' sign. He stated this sign would be in keeping with existing exterior signs on three other Queen Street buildings in the vicinity, namely, the House of Hay property, the Melinda MacLean law office property and the Archibald & Lederman law office property.

The Appellant's written submission summarizes its position on Page 7 as follows:

> " In summary, Town Council, to appease a vocal neighbour with little support from the immediate area, acted contrary to the approvals of Heritage Advisory Committee, Town Plan Advisory Committee, and Town Planner (who was not consulted at the hearing), and refused the application, contrary to the policy and intent of the Municipal Development Plan."

On cross-examination by Counsel for the Town, Mr. Weatherby stated that he is a qualified real estate broker and that the Appellant purchased the subject property in July of 1984 knowing of the zoning requirements but nevertheless intending to use the property (upon approval by the Town) for real estate office purposes. Mr. Weatherby indicated that he had consulted the Town's planner prior to the purchase of the property and had met with the Town's Planning Advisory Committee (P.A.C.) who were prepared to recommend approval of an application for a development agreement.

Mr. Weatherby stated that the Appellant's intent was to have a prestigious office in the downtown area. He was of the opinion that the Appellant by restoring and revitalizing the subject building would benefit the Town as it would have the effect in time of increasing the values of neighbouring properties. He stated that the area in which the subject property is located is in an area of mixed uses now. Finally, he stated that the Appellant's present offices are located on Prince Street in the Town of Truro.

Peter A. Nelson, a qualified planner employed by the Town of Truro, was called by the Appellant. He graduated from the Nova Scotia College of Art and Design in 1972 with the degree of Bachelor of Design in Environmental Planning. He is familiar with the Appellant's proposal for the subject site and had recommended approval of the application for a development agreement on the basis that he considered the proposal to be within the intent of the M.P.S. with which he was also familiar.

On cross-examination, Mr. Nelson was referred to the Town's Land-Use By-law Section 4, setting out the General Provisions for all Zones, Clause 4.26 of which outlines the uses permitted by Development Agreement. Clause 4.26 reads as follows:

> "Notwithstanding anything else in this By-law
>
> a) Council may by resolution under the authority of Section 33(2)(b) and 34 of the Planning Act
> and Policies: P-203(b) and (c)
> P-229 of Part II-A of the Residential Section
> and P-233(b)
> P-235(c)
> P-237 of Part II-B of the Commercial Section
> and P-246
> P-257 of Part II-C of the Industrial Section
>
> All of which are subject to policies:
>
> P-503
> P-504
> P-505 and
> P-506 of Part V of the Implementation Section of the Municipal

> approve any so specified development which would not otherwise be permitted by this By-law.
>
> (b) Approval by Council under clause (a) shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with Council containing such terms and conditions as Council may direct."

Mr. Nelson was then asked to read Policies P-203(b) and (c) from the Town's M.P.S. filed as Exhibit T-3. The witness read Policy 203(b) only as there is no Policy 203(c) in the M.P.S. He was then asked if the Town could enter into a Development Agreement pursuant to Policy P-203(b) and (c) to which the witness responded, "I would think not".

Policy P-203(b) reads as follows:

> "Therefore, it shall be a policy of Council to: Appropriately zone existing commercial uses in residential medium to high density areas provided that:
>
> (i) such uses existed prior to the adoption of this Plan, and
>
> (ii) such zones are limited to the lot on which the use is existing."

On questioning from the Board as to how he considered the Appellant's proposal met the intent of the Town's M.P.S., Mr. Nelson stated that in his opinion there was a typographical error in the wording of Clause 4.26(a) of Section 4 of the Land-use By-law in that the reference to Policy P-203(b) and (c) should read P-204(b) and (c). With this correction to the Land-Use By-law Mr. Nelson was of the opinion that the proposed development agreement could not only be considered by the Council but could be permitted by virtue of Policy P-204(c).

The Board is of the opinion that there is a patent error in clause 4.26(a) of the Town's Land-Use By-law as the reference to P-203(b) and (c) in that clause obviously make no sense and is out of context with the intent of the sub-clause (a) of clause 4.26 which lists the various policies in the M.P.S. (M.D.P.) under the authority of which the Council may by resolution approve "any so specified development which would not otherwise be permitted by this By-law."

It is therefore the Board's opinion that the reference to "P-203(b) and (c)" in clause 4.26(a) of the Town's Land-use By-law is a typographical error and should read "P-204(b) and (c)".

David G. Gilroy, the Town Clerk/Treasurer was called by Counsel for the Town. He briefly outlined the events leading to the decision of the Council which is the subject of this appeal. He maintains the Town's official file respecting the Appellant's application for approval of a development agreement. The application was made on May 8, 1984. The Council referred the application to the Planning Advisory Committee (P.A.C.). The P.A.C. after holding a meeting recommended approval to the Council. On August 6, 1984, a public hearing before Council was held.

Mr. Gilroy identified Exhibit T-11 as containing extracts from the Minutes of the Town Council respecting the subject application. The Minutes of the Council Meeting held on August 6, 1984 when the public hearing was held on the Appellant's application indicate that the Town's solicitor

(David Gruchy, Q.C.) had "declared a conflict-of-interest and removed himself from Council table". The Minutes also indicate that the Council had received a petition signed by twenty-two residents opposing the approval of the agreement. This petition was read at the meeting. It was also noted that Mrs. Helen MacLellan spoke "in support of the petition on behalf of a few residents who attended the meeting..." and Mr. Paul Weatherby of Century 21 had addressed the Council. The Minutes further indicate that "Mr. Nelson advised Council that agreements are allowed under the present plan and that up to four apartments could be put on the property with no agreement." Mr. Gilroy identified Exhibit T-15 as a photocopy of a petition signed by some Queen Street residents requesting the Council "to make no changes in the existing building by-laws applicable to this portion of Queen Street. We see no compelling reason in practice nor in principle for any spot zoning or contract development of this fine old residential area of the town which would encourage commercial development of the North side of Queen Street."

Mr. Gilroy identified T-14 as a letter dated August 9, 1984 which he sent to the Appellant advising that the application had been refused by Town Council "due to opposition from the area".

Evidence was given by Mrs. Helen MacLellan an owner/resident of the adjacent property known as #129 Queen Street. She stated that in her opinion there was no compelling reason for Council to permit a commercial use of the subject property which lies within a residential area. She said that there are many vacant commercial areas in the Town where commercial uses could be located. She objected to business uses popping up all over the Town when there is a business core in the Town. She expressed concern for the extra traffic which might be generated at the subject site which lies at a very busy corner. She pointed out that the House of Hay property near her own property was used for office purposes but most of the other properties in the area were used for residential purposes. She expressed the view that the Town should endeavour to utilize the existing commercial areas of the Town before allowing commercial uses in residential areas. She expressed concern over the proposed use by the Appellant of an exterior sign which she considered inappropriate.

Joan Flemming a twenty-year owner/resident of 98 Queen Street testified that she is not in favour of business being allowed in her immediate area. Her property is located on the south side of Queen Street seven houses west of Lorne Street.

Following the completion of the evidence Mr. Weatherby on behalf of the Appellant and Mr. Curtis on behalf of the Town made oral submissions to the Board.

Mr. Weatherby's submission was that the M.P.S. made provision for the type of development proposed under the Land-use policies P-204(b) and P-204(c) set forth in Section 23 of the Residential portion of the M.P.S. respecting Revitalization Areas I and II. Mr. Weatherby submits that the Appellant's proposed use of the first floor of the subject building for real estate offices is a "professional" office use. The Board disagrees with Mr. Weatherby's submission that the use of a portion of the subject building is a "professional" use. It is however, an office use and as such comes within the terms of Policy P-204(c) which incorporates by reference the provisions of Policy P-204(b) which clearly states that it is a "policy of Council to: consider (and may permit) office, professional and medium to high density residential uses of five or more dwelling units in revitalization area I as designated on the Future Land-Use Map by development agreement only." Mr. Weatherby points out that the subject site is in Revitalization Area II.

He submitted that there was no substantial opposition to the Appellant's proposal, the only opposition being from those persons who had signed the petition who he alleged were not "representative of the owners of properties which might be affected.

Mr. Curtis submitted that the first ground of appeal set out in the Appellant's Notice of Appeal is not by itself a basis for allowing the appeal although it is clear that the Council did in fact refuse the application in question on the basis of "opposition from the area" as may be seen from the contents of the letter sent to the Appellant by the Town Clerk (Exhibit T-14).

Mr. Curtis conceded that the Appellant's second ground of appeal was in essence a valid one but he questioned the wording of this second ground which he indicated could have been more precise.

Mr. Curtis questioned whether or not the Town, even if it wished to do so, could properly enter into the development agreement proposed by the Appellant without enacting a prior amendment to the Town's Land-Use By-law (Zoning By-law) to specifically permit the approval of the development agreement proposed. He referred the Board to the provisions of Section 38(2)(p)(i) and Section 56 of the Planning Act, S.N.S., 1983, c. 9. Section 38(2)(p)(i) states that "a municipal planning strategy or an inter-municipal planning strategy may include statements of policy with respect to any or all of the following:

> "(p) policies governing
>
> (i) the use of development agreements in accordance with Section 55".

Section 55 of the Planning Act reads as follows:

> "(1) Policies adopted by a council pursuant to clause (p) of subsection (2) of Section 38 to provide for development by agreement shall identify matters that the council shall consider prior to the approval of an agreement and the developments that are subject to agreement.
>
> (2) Where a municipal planning strategy contains policies pursuant to subsection (1), the land-use by-law shall identify the developments to be considered by agreement."

Mr. Curtis also referred to Section "F" of the implementation section of the M.P.S. at pages 95 and 96 which has already been quoted in this decision and he emphasized that the M.P.S. stipulates at p. 56 that "it is the intention of this plan to deal with those developments of a large scale by development agreements as outlined in this Plan, and only then at Council's discretion."

Mr. Curtis further argued that Council has to exercise a discretion in permitting developments by agreement and to have regard for but shall not be limited to the following matters set forth in Policy P-504, viz:

> "1. The impact of the proposed development
>
> (i) abutting land uses
> (ii) municipal services
> (iii) pedestrian and motor traffic.
>
> 2. The suitability and availability of other appropriate sites in town for the proposed use.
>
> 3. Comments arising from a public hearing on the proposed development.
>
> 4. The submission of a site plan showing the location and scale of the structures on the lot, parking areas, landscaping, and building plans showing the nature and design of the proposed structure."

Finally, Mr. Curtis submitted that pursuant to Policy P-503 Council could only deal with "large scale" developments. P-503 reads as follows:

> "Therefore, it shall be the policy of Council to:
>
> P-503 - Consider (and may permit, consistent with this plan) developments, which may not otherwise be permitted by the Zoning By-law, only by agreement pursuant to Section 33(2)(b) and Section 34(1) of The Planning Act."

The references to Sections 33 and 34 of the planning in Policy P-503 obviously are Sections in the 1969 Planning Act, S.N.S. 1981 c. 16.

The Board viewed the subject property and properties in the vicinity of the subject property.

The issue in this appeal is whether the decision of the Town Council in refusing to enter into a development agreement with the Appellant "cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy, within the context of s.s.(4) of Section 72 of the Planning Act S.N.S. 1983, c. 9. Under the provisions of s.s.(4) of Section 72 the Board is obliged not to "interfere" with the council's decision unless the Board determines that the Council's decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy."

The Board after having reviewed the evidence adduced at the hearing, having visited the subject site and lands in the vicinity and having heard argument on behalf of the Appellant and the Town has determined that the Council's decision cannot reasonably be said to be consistent with the intent of the Town's M.P.S.

The subject property is located at the corner of Queen and Lorne Streets in an area of the Town zoned Residential/Mixed Use (R-8) consisting mainly of older homes. There is a large Victorian styled residence on the subject lot presently used as a four unit converted dwelling house with two units on the first floor and two units on the second floor, a third storey (attic) is vacant. Queen Street is a heavily travelled street. Directly across Queen Street from the subject property is a parking lot used by persons attending a church located behind the parking lot. Immediately adjacent to the subject property on the east is the residential property of Mrs. Helen MacLellan in which more than one dwelling unit is located. Immediately adjacent to the north of the subject property on Lorne Street is an eight unit apartment building. A school is located on the west side of Lorne Street in the general vicinity of the subject property. The fourth property to the east of the subject property is Civic No. 147 Queen Street on which is located an older dwelling house presently used as business offices by the House of Hay. This property has a prominent business sign on the front of the building. East of the subject site at the corner of Queen and Logan Street is a dwelling house (Civic No. 187 Queen Street) currently used as the professional law offices of Archibald & Lederman. On the south side of Queen Street (Civic No. 188) at the corner of Logan Street is another dwelling house in which is located the law office of Melinda MacLean on which there are two prominent exterior signs.

It is clear that the proposed use of the subject property to provide the Appellant with business offices on the ground floor and to continue the present use on the second floor with two apartment units is a use not now permitted under the R-8 zoning category for the property. The allowable uses under the Land-Use By-law are "single family detached dwelling" and "converted dwelling". A special requirement of the Land-Use By-law for the Residential/Mixed Use Zone (R-8) is that "no development permit shall be issued in an (R-8) Residential Zone for the converted dwellings of more than (4) four dwelling units".

The Town's M.P.S. (M.D.P.) filed as Exhibit T-3 however, makes provision for the establishment of two Revitalization Areas I and II the geographic limits of which are shown on the Future Land-Use Map a copy of which is attached to and forms part of the Town's M.P.S. The subject property is clearly included in the area designated "Revitalization Area II as shown on the Future Land-Use Map. The M.P.S. at page 11 points out that the people of Truro have a great deal of pride associated with certain areas of the down town in which are located buildings of Victorian architecture. Revitalization Areas I and II are stated in the M.P.S. to be architecturally significant areas. The M.P.S. makes it clear that designating these areas for solely medium density residential uses "is seen to be detrimental to this architectural heritage". The M.P.S. therefore sets out policies intended "to limit the current uses so as to expand, in a controlled fashion, land uses possibilities for this area and at the same time preserve this heritage."

Policies P-204(a), P-204(b) and P-204(c) provide the authorization for the Council to create a Residential Mixed Use Zone which it has done (R-8 Zone) and for Council to consider and permit office, professional and medium to high density residential uses in Revitalization Area I by way of development agreement (P-204(b)) and to consider and permit under P-204(c) in addition to the uses outlined in P-204(b), restaurant uses in Revitalization Area II also by way of Development Agreement.

The Town's Land-Use By-law (Exhibit T-4) makes provision in Section 4 clause 4.26 for "uses permitted by development agreement". These uses include specified developments not otherwise permitted by the By-law. One of such uses which could be approved by Council is the type of development proposed by the Appellant which comes within Policy P-204(c) and is subject to the same criteria as in Policy P-204(b).

The Council (and this Board) in evaluating a proposed development agreement under Policies P-204(b) and P-204(c) in addition to certain details to be given by the developer respecting architectural preservation, landscaping etc. must also consider the criteria outlined in the Implementation part of the M.P.S. These Implementation criteria are contained in Policy P-504 and have been set out in full in this decision at page 10.

It is the opinion of the Board that the development proposed by the Appellant as set forth in the draft development agreement filed as part of Exhibit T-6 is the type of use contemplated by the Town's M.P.S. for Revitalization Area II and which may be approved by the Council through the development agreement process under Section 4, clause 4.26 of the Town's Land-use By-law (after correcting for the obvious error in clause 4.26 as previously noted).

The proposed development when implemented in accord with the draft development agreement will have the effect of assisting in the preservation of the Victorian architecture of the building on the subject site in accordance with the M.P.S. policies P-204(b) and P-204(c) and is therefore a development which in the opinion of the Board meets the intent of the M.P.S. and is in conformity with the Town's Land-Use By-law.

Counsel for the Town was correct in emphasizing the fact that the development agreement process which when implemented allows for uses which are not permitted under the Land-Use By-law as of right should be used only at the Council's discretion. In this case, however, Council in exercising its privilege of refusing to enter into a development agreement with the Appellant did so on the basis of "opposition from the area" which is certainly a relevant matter for Council's consideration but does not necessarily mean that the proposed development does not reasonably meet the intent of the M.P.S.

The Planning Act makes provision in s.s.(1) of Section 72 for an appeal to this Board from the Council's decision refusing to enter into a development agreement. The Board must make a determination under s.s.(4) of Section 72 as to whether the Council's decision was "reasonably" consistent with the intent of the Town's M.P.S.

The Board recognizes that some residents and owners of properties within a block of the subject site have indicated by way of a petition and through the evidence of Mrs. MacLellan and Mrs. Joan Flemming that they object to the Appellant's proposed development, nevertheless the proposal has been recommended by the Town's planner and by the Town's P.A.C. The Board accepts the expert testimony of Mr. Nelson, the Planner, who has studied the proposed development in relationship to the M.P.S. and Land-Use By-law and who recommended approval based on his opinion that the proposed development was in keeping with the intent of the M.P.S.

The Board therefore allows the appeal and refers "the matter back to the Council" under the provisions of s.s. (4)(a) of Section 72 of the Planning Act in order for the Council and the Applicant (Appellant) to approve and enter into a development agreement.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 8th day of February, A.D., 1985.

RH Blois
R.H. BLOIS

E Lawrence
ELIZABETH LAWRENCE

Darryl W. Wilson
DARRYL W. WILSON

Members,
NOVA SCOTIA MUNICIPAL BOARD.

Carey v. County of Kings

PLANNING--ZONING AMENDMENT--REFUSAL--R-1 TO I-1 TO PERMIT USE FOR RELIGIOUS AND EDUCATIONAL PURPOSES--REASONABLY CARRIES OUT INTENT OF M.P.S.--PLANNING ACT, S.63(1),(3),(4),(5)--M.P.S. SECTION 3.4. POLICIES 1 AND 9; SECTION 4.1 POLICIES 1 AND 9; SECTION 4.4 POLICIES 2 AND 3; SECTION 6.10 POLICY 16; IMPLEMENTATION POLICY 16

This is an appeal from a decision of the Council of the Municipality of the County of Kings refusing an application to rezone the Appellants' land in the Village of Aylesford from Residential (R-1) to Institutional (I-1) to permit use of the property for religious and educational purposes. The lot is 170 ft. by 180 ft. and has on it a large house which has been used for the last ten years as an apartment building with three to four units. Attached is a long single storey structure referred to as the carriage house. There is a large area at the back used for parking. Its present use is a non-conforming one.

HELD: The Board allows the appeal and instructs Council to amend the Land-use By-law by rezoning the subject property from Residential One and Two Family (R-1) to Institutional (I-1).

The sole issue in this appeal is whether the decision of Council reasonably carries out the intent of the Municipal Planning Strategy (M.P.S.). The location of the subject site is extremely important in determining whether Council's decision carries out this intent. The Board finds the site partly within the the business district on the future land-use map and partly outside the business district. The part outside is not given any designation on the map, but is contiguous to the business district. Implementation Policy 16 can be invoked to consider the area outside the business district to be used for a use allowed in the business district, and this includes an institutional use. The property if rezoned to Institutional would not conform to the side yard regulations for an I-1 zone. The Board recognizes the legitimate concerns of Council in not wanting to appear to sanction the use of property contrary to the Land-use By-law, but these concerns are not a matter for the Board to consider in an appeal from Council's decision. With respect to concerns raised at the public hearing, the Board is of the opinion that where these views are contrary to the intent of the M.P.S., Council should be guided by the policies in the M.P.S. and not the views expressed in public hearings. The Appellants' application complies with the intent of the M.P.S. They have discharged the onus on them. While the Board has allowed the appeal, this matter could have been better dealt with by way of a contract development agreement.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by Jon and Rhonda Carey, from a decision of the Council of the Municipality of the County of Kings refusing to rezone certain lands in the Village of Aylesford, Kings County, from Residential (R-1) Zone to Institutional (I-1) Zone.

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: ERIC O. STURK, LL.B., for the Appellants

PETER N. McINROY, LL.B., for the Respondent, the Municipality of Kings County.

DECISION

This is an appeal by Jon and Rhonda Carey (the Appellants) from a decision of the Council of the Municipality of the County of Kings, made on October 2, 1984 refusing an application to amend the municipality's Land-use By-law by rezoning the Appellants' land located on the north side of Provincial Highway No. 1, in the Village of Aylesford, Kings County, from Residential (R-1) to Institutional (I-1) Zone in order to permit use of the property for religious and educational purposes.

The Appellants' Notice of Appeal is dated October 12th 1984 and it was received by the Board on October 16, 1984. An amended Notice of Appeal, requested by the Board, was received on October 29, 1984.

The appeal is brought pursuant to Subsection 63(1) of the Planning Act which reads as follows:

> "63(1) The amendment, revision or refusal by a council to amend or revise the land-use by-law may be appealed by
>
> (a) an aggrieved person;
>
> (b) the applicant;
>
> (c) the Director;
>
> (d) the council of an adjoining municipality."
> (underline added)

The amended Notice of Appeal set forth the following grounds of appeal:

> "1. That the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.
>
> 2. The decision of the Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality.
>
> 3. That Council erred in not following the recommendation of the Planning Advisory Committee that the property be rezoned, and erred in not giving any reasons for not following the recommendation of the Planning Advisory Committee.
>
> 4. That Council failed to consider the Appellants fundamental freedoms of conscienous (conscience) and religion, and peaceful assembly guaranteed by the Canadian Charter of Rights and Freedoms."

The hearing of this matter took place on February 13, 1985 in the Council Chamber of the Municipality of the County of Kings which is located in the Town of Kentville, Kings County.

At the commencement of the hearing, Counsel for the Appellants filed with the Board an Affidavit of Service of Notice of Hearing. Counsel agreed that the appeal was properly before the Board and the Board had jurisdiction to hear the merits of the appeal.

The subject property is located on the north side of Provincial Highway No. 1, approximately 150 feet west of the intersection of Commercial Street and Provincial Highway No. 1, in the Village of Aylesford, Kings County. It is bounded on the west by the Bank of Nova Scotia and on the east by the dwelling of Mrs. Catherine Phinney. The land to the north is vacant and opposite the subject property on the south side of Provincial Highway No. 1 is a service station.

The lot has a 170 foot frontage on the highway and is 180 feet deep. It is improved with a large house known at one time as the Rosebank Inn and currently as the Whitman house. For approximately the last ten years, the house has been used as an apartment building containing three to four units. Attached to the house is a long single storey structure hereinafter referred to as the carriage house. There is a large area at the back of the property used for parking.

The Appellants, who own the property, reside in part of the house and rent two apartments in the remainder of the house. The subject property is currently zoned R-1. Its present use is a non-conforming use. The Appellants propose to use the property for religious and educational purposes. In order to be able to use the property for these purposes, the Appellants applied to the Council of the Municipality of the County of Kings to amend the Land-use By-law by rezoning the property to an Institutional (I-1) Zone.

A certified copy of the Municipal Planning Strategy and a certified copy of the Land-use By-law of the Municipality of the County of Kings were filed as Exhibits C-4 and C-5 respectively.

The relevant provisions of the Municipal Planning Strategy read as follows:

"Part III-General Plan Policies
Section 3.4 Institutional

Policy (1) It shall be the policy of Council to recognize institutional uses as an integral part of the land use function of all communities and permit by an amendment to the Zoning Bylaw future institutional uses to locate in a centralized area accessible to the residents. Certain institutional uses such as schools and churches will be permitted in residential areas subject to the other policies of this Plan.

Part IV-Urban Policies
Section 4.1 Growth Centre
Page 61 Text:

The development limits and land use are shown on the future land use map for each growth centre and are contained in Volume II of this Plan. Preceding each map is a brief explanation of the rationale pertaining to specific land use designations. Urban uses are permitted in accordance with the policies of this Plan but a number of land uses listed in the Implementation Part will require rezoning to the appropriate zone. Business Districts are identified, where feasible, to encourage the development of grouped commercial, institutional, and industrial uses with some residential. Primarily residential development is encouraged within the development limits outside of the Business District.

Policy (1) It shall be the policy of Council to designate eleven growth centres in which the majority of growth is to be centralized and managed. These communities are:

AYLESFORD
WATERVILLE-CAMBRIDGE
CANNING
CENTREVILLE
COLDBROOK
GREENWOOD
HANTS BORDER
KINGSTON
NEW MINAS
NORTH KENTVILLE
PORT WILLIAMS

Policy (9) It shall be the policy of Council to designate business districts in most of the growth centres where the majority of commercial, institutional and industrial land uses will be permitted to develop by an amendment to the Zoning Bylaw provided the development is in accordance with all applicable policies of the Plan. Existing residential uses shall also be permitted as conforming uses in the business districts.

Part IV-Urban Policies
Section 4.4 - Institutional

Policy (2) It shall be the policy of Council to encourage institutional uses including medical services, churches and denominational uses, educational services, government services, and social, cultural and recreational uses to locate in business districts of growth centres.

Policy (3) Under Section 33(2)(b) of the Planning Act, 1969, Council shall permit the location of schools and churches in residential zones. As a condition for approval the applicant shall be required to enter into a development agreement with the Municipality under Section 34(1) of the Planning Act, 1969, specifically setting out the conditions under which development may proceed. The development agreement shall not require an amendment to the Zoning Bylaw, but shall be binding to the property until the agreement, or part thereof, is discharged to the Municipality. The conditions of the agreement shall regulate the following and other criteria Council may deem necessary:

(a) The lot must have access from an arterial or collector road.

(b) Adequate parking must be provided on the premises for all users of the facility.

(c) The use must not generate excessive traffic which will detrimentally affect normal residential traffic flow.

PART VI - Implementation
Section 6.10

> Policy 16 The Land use Map is a graphic representation of the Land Use Districts which are to be developed in accordance with the policies of this Plan. Areas contiguous to a given district may be considered for a zoning amendment to a use permitted within that district without an amendment to this Plan, and provided that all other policies of this Plan are met.

PART VII - Growth Centre Maps
Page 120.

> In the growth centres in which urban development pressure is not great enough to necessitate the preparation of sector plans the future land use maps and the growth centre policies serve as community plans. Urban land uses are permitted in accordance with the policies of this Plan but a number of land uses listed in the Implementation Part of Volume I will require rezoning to an appropriate zone. Business Districts have been identified, where feasible, to encourage the development of grouped commercial, institutional, and industrial uses thus establishing focal points. Except where otherwise indicated, primarily residential development will be encouraged within the development limits outside the business districts."

Immediately after Page 122 of the Municipal Planning Strategy is the future land-use map for the growth centre of Aylesford. This map forms part of the Municipal Planning Strategy. The area of land referred to as the business district of the Aylesford growth centre is identified on this map by the letter "U" inside the black lines which define the boundaries of the district. West of the business district is an area of land designated residential. Between the business district and the residential district is an area of land which is not given any future land-use designation.

The Municipality's Land-use By-law sets forth the following permitted uses in a Residential one and two family (R-1) Zone, namely:

> "Single family dwellings
> Duplex dwellings
> Semi-detached dwellings
> Residential day care centres
> Neighbourhood parks
> Playgrounds
> Multi-Sectional Modular Homes"

The Municipality's Land-use By-law sets forth the following permitted uses in an Institutional (I-1) Zone, namely:

> " Principal Uses
>
> Educational institutions
> Churches and denominational institutions
> Group care facilities
> Government and public services
> Community centres
> Fire stations
> Libraries, museums, and art galleries
> Any incorporated institutional use
> Staff residences in association with the above uses
> Camps sponsored by non-profit organizations
>
> Uses subject to Conditions
>
> Senior Citizens housing units adjacent to Grand View Manor
> Hospitals and medical clinics"

The R-1 Zone and the I-1 Zone make provision for certain regulations and any permitted use in these zones must comply with the regulations. Section 5.1.3 of the Land-use By-law sets out regulations for a R-1 Zone, and one of the regulations is that the minimum side yard be four feet. Section 7.3.3 of the Land-use By-law sets out regulations for an I-1 Zone and one of the regulations is that the minimum side yard for church institutions be 20 feet.

Section 3.8 of Part 3 (General Provisions for All Zones) of the Land-use By-law reads as follows:

> "Where a building has been constructed on or before the effective date of this By-law on a lot having less than the minimum frontage or area, or having less than the minimum setback or side yard or rear yard required in this By-law the building may be enlarged, reconstructed, repaired or renovated provided that:

> (a) The enlargement, reconstruction, repair or renovation does not further reduce the front yard or side yard or rear yard that does not conform to this Bylaw; and
>
> (b) All other applicable provisions of this Bylaw are satisfied.

Counsel filed as Exhibit C-8 an Agreed Statement of Facts dated February 6, 1985 which reads as follows:

> "(1) Jon and Rhonda Carey are the owners of a parcel of land in the Village of Aylesford, Kings County, Nova Scotia which parcel has been known as the Whitman property and which contains a building;
>
> (2) The property is the subject of the above-mentioned planning appeal and it located on the north side of provincial highway #1 and is bounded by lands of the bank of Nova Scotia on the east and by lands of Mrs. Catherine Phinney on the west;
>
> (3) The property is partly in and partly out of the business district of the Village of Aylesford and is presently zoned R1 according to the Land Use (Zoning) By-Law of the Municipality of the County of Kings;"

Evidence for the Appellants was given by Fred Wendt, Jon Carey and Robert Elliot.

Fred Wendt is employed by the Municipality of the County of Kings as a Development Planner. He has a degree in Environmental Planning from the Nova Scotia College of Arts and Design. He is responsible for reviewing rezoning applications and preparing a planning report for presentation to the Planning and Recreation Advisory Committee (PRAC) for recommendation to County Council. He estimated that he has reviewed and prepared

Planning reports on approximately 50 rezoning applications since he began employment as a development planner with the Municipality.

Mr. Wendt's report dated August 17, 1984 to PRAC and the PRAC Report dated October 2, 1984 to County Council recommended that Council approve the Appellants' application for amendment to the Land-use By-law. A copy of Mr. Wendt's report to PRAC and a copy of the PRAC Report to Council were introduced as part of Exhibit C-6.

Mr. Wendt stated that the subject property lies within the business district of the Aylesford growth center. He referred to the future land-use map for the Aylesford growth center which forms part of the MPS. He marked the location of the subject property in red ink on this map. The point he marked in red straddles the heavy black line which purports to be the southwestern boundary of the Aylesford business district.

Mr. Wendt referred to Policy 1 of Section 3.4 and Policy 2 of Section 4.4 of the Municipal Planning Strategy, quoted at Pages 4 and 5 respectively of this decision, and said that the Appellants' proposal was consistent with these MPS policies which provide that Council's intention is that institutional uses locate in centralized areas of the community by means of an amendment to the Land-use By-law.

In his report to PRAC, Mr. Wendt pointed out that the only property adversely affected by the rezoning was Mrs. Phinney's residential property located immediately to the west of the subject property. Mr. Wendt also indicated that the Land-use By-law requires a new institutional building to have a 20' side yard and the existing building only has a 5' side yard. He further indicated that although the side of the building facing Mrs. Phinney's property was relatively small, the Land-use By-law allowed non-conforming structures to be enlarged provided the 5' side yard was not encroached upon. He also pointed out that the Land-use By-law requirement that parking space could not be located closer than 10' from a side yard property line would provide protection to the adjacent property owner.

The PRAC Report to Council included the above comments by Mr. Wendt.

On cross-examination, Mr. Wendt identified a copy of a map showing part of the Village of Aylesford, filed as Exhibit C-9. That map identifies the subject property, the property of Mrs. Phinney and other properties in the general vicinity of the subject property. The map was included with Mr. Wendt's report to PRAC for illustration purposes. It does not form part of the MPS. Mr. Wendt superimposed on this map a heavy black line indicating the southwestern part of the business district of the Aylesford growth center. The line drawn by Mr. Wendt runs through the subject property indicating that part of the subject property is within the business district and part of the property is outside the business district.

Mr. Wendt agreed with Counsel for the Municipality that Policy 3 of Section 4.4 of the MPS, quoted at Page 5 of this decision, might apply to the subject property. This Policy allows Council to permit the location of churches in residential zones by contract agreement. This fact was not mentioned in

Mr. Wendt's report to PRAC or in the PRAC Report to Council.

Mr. Wendt also stated on cross-examination that although he did not mention in his report that Mrs. Phinney was opposed to the rezoning, her letter opposing the rezoning was presented to PRAC and to Council.

The conclusion of the PRAC report to Council reads as follows:

> " The proposal conforms to Plan policies for institutional uses. However, since there is a residence so close to this proposed use, valid concerns of this neighbour should be considered, although the applicant has stated the neighbour has no problem with the proposal.
>
> It is therefore recommended that this application to rezone lands from R1, Residential to I1, Institutional be approved."

Jon Carey, one of the Appellants, testified that he and his wife own the subject property. They reside in part of the building and rent two apartments in the remainder of the building. He stated that a group of people belonging to the Aylesford Baptist Christian Centre meet in the house on Sunday for worship, bible study and youth meetings. The part of the building closest to Mrs. Phinney is the long, single storey structure previously used as a Carriage House. It is now used once a week for Sunday School classes. There is a piano located in this part of the building. Mr. Carey said that he painted the window in the wall overlooking Mrs. Phinney's property so that no one could see out the window. He also stated that he is prepared to erect a fence along the common property line with Mrs. Phinney, if she requests it. He stated that the noise level in the area would not be any greater than presently exists, since it would be difficult to create more noise than the Irving Service Station located across the highway.

Robert Elliot is the Director of Planning and Development for the Municipality of the County of Kings. He is a qualified land-use planner and has thirteen years experience in all phases of planning with the Municipality. Mr. Elliot said that policy statements (Policy 1 of Section 3.4 and Policy 2 of Section 4.4) in the MPS encouraged the location of institutional uses in business districts of growth centers. He also said that churches and demoninational uses could locate in residential zones by way of contract agreement (Policy 3 of Section 4.4).

In Mr. Elliot's opinion, the subject property falls generally within the business district for Aylesford. He referred to the future land-use map of the growth center of Aylesford, filed as part of Exhibit C-4. He pointed out that the map is intended to be a graphic representation of Council's intention of future development in the community. He stated that the boundary lines identifying the various future land-use districts on the map are purposely drawn in a general fashion to provide some flexibility in the future development of these districts. According to Mr. Elliot, the boundary lines for the future land-use districts don't follow property lines or other distinguishing features. Mr. Elliot said that Municipal

Planning Strategies are developed with some degree of flexibility while the Land-use By-law, being the tool to carry out the intent of the Municipal Planning Strategy, is more specific.

Mr. Elliot stated that because of the flexibility in the Municipal Planning Strategy interpretation Policy 16, quoted at Page 6 of this decision, was inserted to deal with land-use policies and assist in deciding on zoning amendments.

Mr. Elliot said that two routes were available to enable the Appellants to use the subject property for religious purposes: namely, to apply to amend the Land-use By-law or to apply for contract agreement. In Staff's opinion, the reasonable approach was to interpret that the property was within the business district and for the Appellant to proceed by way of application to amend the Land-use By-law.

Mr. Elliot also stated that in considering rezoning applications in situations where existing buildings are going to be used, Staff look at the building located on the property as well as the proposed use. He acknowledged that the 20 foot side yard required for an institutional use would not be met in this instance. He pointed out that Section 3(8) of Part 3 of the Zoning By-law quoted at Page 8 of this decision, although not dealing with a "use" per se, allows existing buildings to be expanded even if the side yard requirement is not met. Mr. Elliot stated that the side yard requirement was the only feature not met by the Appellants' rezoning application and in his opinion, this was not sufficient reason to recommend rejection of the Appellants' application. He agreed with Mr. Wendt's recommendation to approve the application to amend the Land-use By-law with respect to the subject property.

Evidence on behalf of the Municipality was given by Councillors Robert Bickerton, Jerry Buchan and Robert Whalen.

Councillor Bickerton represents District No. 1 on King's County Council. District No. 1 does not include the Village of Aylesford. He said he voted against the rezoning because it would create a non-conforming use contrary to the Municipal Planning Strategy by allowing the subject property to be used for an institutional use with less than the required side yard. He was also concerned that some of the other permitted uses in an Institutional Zone were not compatible with Mrs. Phinney's property. Finally, he took into consideration that the adjacent property owner was opposed to the rezoning.

Councillor Buchan represents District No. 9 on King's County Council. District No. 9 does not include the Village of Aylesford. He said he voted against the rezoning application because the people who lived in the immediate vicinity of the subject property were opposed to the rezoning and he gave more weight to their views. He also was concerned that the subject property did not meet the side yard requirement for an institutional zone.

Councillor Whalen represents District No. 7 on King's County Council. District No. 7 does not include the Village of Aylesford. He voted against the rezoning application because the rezoning would create a non-conforming use contrary to the Municipal Planning Strategy. He also thought that some of other allowable uses in an institutional zone were more objectional than a church use and once the property was zoned I-1 it could be used for any of these uses.

Five people made submissions to the Board although they did not appear as witnesses on behalf of the parties. Speaking in support of the appellants were Flora Dalton, Jerry Vaughn, Mrs. Ronald Balzer and Steve Mitchell. Speaking in support of Council's decision was Mr. Norm Phinney. The Board also received a letter dated October 9, 1984, received on October 12, 1984 from Mr. Paul Bishop supporting Council's decision.

Flora Dalton attends the "Christian Centre" which has been established on the subject property and she spoke of the wonderful things children are being taught. Jerry Vaughn, who resides in the Village of Kingston, is a youth leader at the Christian Centre. He said the centre teaches the kinds of moral and spiritual values of years ago. Mrs. Ronald Balzer resides in the Village of Aylesford, approximately one-quarter mile from the subject property. She attends the Christian Centre and she supports the good deeds being done at the centre. Steve Mitchell resides in Greenwood, Annapolis County. He is employed by the Department of Municipal Affairs as a property tax assessor. He is the Pastor of the Christian Centre. He said that the Centre feels that they have complied with all the requirements of the Municipality and that the Centre should be allowed to continue its good work.

Norm Phinney is the son of Mrs. Catherine Phinney and he resides with his mother in the house next to the subject property. He said that at one time his mother's house was part of the subject property. His mother's dwelling is 10' from the closest building on the subject property. He pointed out that the existing building located 10' from his mother's dwelling could be expanded along the existing 5' side yard. In his opinion, by approving the Appellants' application, his mother's privacy would be infringed upon, her property value would be decreased because of the location of incompatible institutional uses next to her property and the existing building on the subject property would be located too close to a residential property.

Counsel for the Appellants submits that the appeal should be allowed for the following reasons:

(1) The Municipal Planning Strategy designates the Village of Aylesford as a growth center. The subject property lies within the business district of the Aylesford growth center. This fact is supported by the opinions of Mr. Wendt and Mr. Elliot who are expert in planning and zoning matters. Institutional uses are encouraged to locate in business districts of growth centers, therefore, Council's decision does not reasonably carry out the intent of the Municipal Planning Strategy.

(2) The side yard deficiency is more a variance issue than a zoning issue and both Mr. Wendt and Mr. Elliot took the side yard deficiency into account in recommending approval of the Appellants' application.

(3) The proposed religious and educational use of the property would not adversely affect the adjacent property of Mrs. Phinney. Also Mrs. Phinney's property is close to the business district of Aylesford.

(4) It is not fair to lump development issues (possible expansion of the building) and zoning issues together in deciding whether the property should be rezoned.

(5) No expert evidence was called to rebut the testimony of Mr. Elliot and Mr. Wendt by the Municipality.

Counsel for the Municipality submits that the appeal should not be allowed for the following reasons:

(1) The evidence is not clear on whether the subject property is located inside or outside the business district of Aylesford. The evidence of Mr. Wendt was that the business district runs through the subject property. Also interpretion policy 16 does not say that the business district follows a particular boundary line and therefore the boundary line for the business district could be either the eastern or western boundary line of the subject property. Council should have been advised of the possibility of dealing with the Appellants' proposal by way of contract agreement pursuant to Policy 3 of Section 4.4 of the Municipal Planning Strategy.

(2) If the subject property is rezoned I-1, the side yard requirements of the I-1 Zone are not met and therefore some of the protection provided by the zone requirements is lost.

(3) The Municipal Planning Strategy Policies are not the only matters to be considered by Council in deciding whether to amend the Land-use By-law. Public hearings are as important as MPS policies because the Planning Act stresses public input. Council listened to the concerns expressed in the public hearing and considered these concerns to be legitimate. Also Mr. Wendt

and PRAC advised Council to consider such factors as the views of neighbours in the vicinity of the property, uses other than the proposed use allowed in an I-1 zone and how these uses would affect the neighbouring property and the potential that the building could be enlarged.

(4) Council fulfilled the role required of it by the Planning Act by considering the Municipal Planning Strategy Policies and the concerns raised at the public hearing.

Section 63(3) of the Planning Act reads as follows:

> " The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy."

Since the Municipality of the County of Kings has a Municipal Planning Strategy, the sole issue in this appeal is whether the decision of Council reasonably carries out the intent of the Municipal Planning Strategy.

The location of the subject site is extremely important in determining whether Council's decision reasonably carries out the intent of the MPS. If the subject site lies within the area of land referred to as the business district on the future land-use map, Policies (1) and (9) of Section 3.4 and Policy (2) of Section 4.4 are relevant. These policies clearly indicate that it is the intention of Council that Institutional Uses be allowed to locate in a centralized area of a community such as a business district by means of an amendment to the Land-use By-law. If the subject site lies within the area of land referred as a residential district on the future land-use map, Policy 3 of Section 4.4 is relevant and the religious and educational use proposed for the property could only be allowed by means of contract agreement.

In the agreed statement of facts filed as Exhibit C-8, quoted at Page 8 of this decision, Counsel agreed that the subject site was partly inside and partly outside the business district. Although Mr. Wendt and Mr. Elliot were of the opinion that for purposes of the Appellants' application, the subject site lies generally within the area referred to as the business district on the future land-use map, neither stated that the subject site lies entirely within the business district. There was no evidence which placed the subject site entirely within the area of land referred to as residential on the future land-use map.

The Board finds that the subject site lies partly within the area of land referred to as the business district on the future land-use map and partly outside the business district. The portion of the subject site which lies outside the business district lies in an area of land not given any designation on the future land-use map. This area of land is between the land designated as the business district and the land designated as a residential district on the future land-use map.

Also the portion of the subject site that lies in the area of land that is not designated for any future land-use is contiguous to the area of land designated as the business district on the future land-use map.

Implementation Policy 16, quoted at Page 6 of this decision, allows Council to consider the land contiguous to the area designated as a business district on the future land-use map for a zoning amendment to a use permitted within the business district provided that all other policies of the plan are met. Institutional uses are permitted uses within the business district There was no evidence presented to indicate that the proposed use was contrary to any of the other policies of the Municipal Planning Strategy. In the opinion of the Board, Implementation Policy 16 can be invoked to consider the area of the subject site outside the business district for a zoning amendment to an institutional use.

The Board agrees with the evidence of Mr. Wendt and Mr. Elliot that the Appellants' application to amend the Land-use By-law complies with Policies 1 and 9 of Section 3.4, Policy 2 of Section 4.4 and Policy 16 of Section 6 of the Municipal Planning Strategy. There was no evidence indicating the Appellants' application to amend the Land-use By-law contravened any of the Policies of the Municipal Planning Strategy.

Council for the Municipality also argued that the residential property of Mrs. Phinney would lose the protection of the Land-use By-law requirement that buildings used for religious and denominational purposes have a 20' side yard. Also Councillors Bickerton, Whalen and Buchan were of the opinion that approving the Appellants' application would create a non-conforming use.

By rezoning the subject property to an Institutional (I-1) Zone, the use of the property for religious and educational purposes would be an allowable use within that zone. Therefore, the type of use proposed by the Appellants would not be non-conforming. The subject property presently conforms to the side yard requirements for its R-1 Zoning. However, the property, if rezoned, would not conform to the side yard regulations for the Institutional (I-1) Zone. As pointed out by Mr. Elliot, Section 3.8 of the Land-use By-law, quoted at Page 7 of this decision, permits existing buildings with less than the required side yard at the time of the adoption of the Land-use By-law to be expanded even though they do not meet the side yard regulations. However, in the opinion of the Board, this section does not authorize the use of property in contravention of the Land-use By-law when an amendment to the Land-use By-law makes the existing structure non-conforming.

There is no policy direction in the Municipal Planning Strategy to cover situations where an amendment to the Land-use By-law which otherwise carries out the intent of the Municipal Planning Strategy results in the rezoned property contravening a zoning regulation. It is an undisputed fact that the subject property, if rezoned, would be in violation of the side yard regulations for the Institutional (I-1) Zone. The Appellants may or may not have to apply to the Municipal Development Officer for a variance of the requirement of the Land-use By-law with respect to the size of the side yard if they do not wish to use the property in contravention of the Land-use By-law regulations.

The Board recognizes the legitimate concerns of Council in not wanting to appear to sanction the use of property contrary to the Land-use By-law regulations. In the opinion of the Board, these concerns, although valid from Council's point of view, are not a matter for the Board to consider on appeal from Council's decision. The issue for the Board to determine is whether Council's decision reasonably carries out the intent of the Municipal Planning Strategy.

The final argument by Counsel for the Municipality is that the concerns raised at the public hearing are as important as Municipal Planning Strategy Policies in deciding whether to amend the Land-use By-law. In the opinion of the Board, Council should listen to the views expressed at public hearings and consider them in their deliberations. However, the Board is of the opinion that where the views expressed at public hearings are contrary to the intent of the Municipal Planning Strategy, Council should be guided in reaching its decision by the policies of the Municipal Planning Strategy and not by the views expressed in public hearings.

Sections 63(4) and (5) of the Planning Act read as follows:

> "(4) The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The Board is of the opinion that the decision made by

Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy because the Municipal Planning Strategy encourages institutional uses to locate in business districts of growth centers or in areas contiguous to business districts. The subject site lies partly within the business district of the growth center of Aylesford and partly within an area of land contiguous to the business district and therefore the Appellants' application to amend the Land-use By-law complies with the intent of the Municipal Planning Strategy.

The Board is satisfied that the Appellants have discharged the onus on them of establishing that the Council's decision under appeal cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.

Although the Board has allowed the appeal, it is of the opinion that this matter could have been better dealt with by having the Appellants apply for a contract development agreement instead of applying to amend the Land-use By-law. A contract development agreement could have legitimized the side yard deficiency or attached conditions to reduce the impact of the side yard deficiency on the adjoining property. It also could have prevented the property from being used for any of the other uses in an Industrial (I-1) Zone which were considered objectionable by Mrs. Phinney and some of the municipal councillors.

The Board, having considered the evidence and the arguments of Counsel, having studied the Land-use By-law and the Municipal Planning Strategy and having visited the subject site is not satisfied that the Council's decision reasonably carries out the intent of the Municipal Planning Strategy. The Board therefore allows the appeal and under the provisions of Subsection (4)(c) of Section 63 of the Planning Act instructs the Council to amend the Land-use By-law by rezoning the Appellants' property located on the north side of Highway No. 1 in the Village of Aylesford from Residential One and Two Family (R-1) Zone to Institutional (I-1) Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of April, 1985.

Darryl W. Wilson

DARRYL W. WILSON

Riverlake Residents Association v. County of Halifax

PLANNING--ZONING AMENDMENT--STANDING--"AGGRIEVED PERSON"--DEBATES OF HOUSE OF ASSEMBLY AS EVIDENCE--MUNICIPAL BOARD ACT, S.27(4)--PLANNING ACT, SS.2(c), 63(1)

This is an appeal by a residents association from a decision of the Council of the Municipality of the County of Halifax amending the zoning of 3.6 acres of lands owned by Product Tank Car Shop Ltd. from unzoned status to General Industrial (I-1) Zone. The standing of the Appellant to maintain this appeal was challenged. The Riverlake Residents Association is incorporated under the Societies Act. The subject site is within the geographical boundaries of the Association. A portion of its budget is allocated to planning matters, and it also budgets for a community centre, recreational programs, school crossing guards, senior citizens programs and for some items for schools.

HELD: The appeal is dismissed. The Appellant has not proven its standing as an aggrieved person in this matter.

Under s.38(3) of the 1969 Planning Act, no longer in force, an appeal against a zoning decision could be maintained by "an interested person." Under that provision Riverlake Residents Association was recognized as "an interested person" and accorded standing. The issue before the Board now is whether Riverlake Residents Association has standing as "an aggrieved person" pursuant to s.63(1) of the present Planning Act (brought into force in 1983) in the matter of this appeal. In interpreting the term "aggrieved person," the debates of the House of Assembly are not in law relevant evidence to prove the fact of what the intent of the legislature was at the time of the passing of the legislation and are therefore inadmissible. Section 2(c) of the Planning Act, which states a purpose of the Act relating to public participation, emphasizes primarily public participation in the preparation and approval of municipal planning strategies and land-use by-laws, and may apply to the approval or refusal by a Council to approve land-use by-law amendments. It does not extend to an unrestricted right of appeal for each and every citizen. In respect of the reference in s.27(4) of the Municipal Board Act to a person with a "real and substantial interest" and to the Association's consistent and demonstrated commitment to planning issues, such a "real and substantial interest" in planning does not necessarily equate to the status of an "aggrieved person" and is not an issue in this appeal. Cases related to standing in appeals on constitutional issues and applications for certiorari and other judicial remedies are not analogous to this situation involving a statutory right of appeal provided by the Planning Act. The change of criteria from "interested person" to "aggrieved person" can be construed no other way than as an intention to restrict to some degree those who have the right to appeal this type of decision. The Appellant has not shown that it is an "aggrieved person" by reason of having suffered a legal grievance or the imposition of a burden or obligation, or by reason of a denial of some personal or property right, and therefore is not an "aggrieved person" in the matter of this hearing. It is not sufficient for the Association to claim that if any of its members are aggrieved, it has an agency or representative capacity to represent them and therefore is itself an aggrieved person. Such a purpose is not stated in its Constitution, and the Appellant is limited to those purposes.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by RIVERLAKE RESIDENTS ASSOCIATION from a decision of the Council of the Municipality of the County of Halifax made April 2, 1984, which zoned a portion of the lands of Product Tank Car Shops Limited (PROCOR) at Windsor Junction from unzoned status to General Industrial (I-1) Zone.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman.

COUNSEL: PAUL B. MILLER, LL.B, and IVOR WINTERS, Articled Clerk, for the Appellant;

PETER J.E. McDONOUGH, Q.C., and CANDACE MALCOLM, Articled Clerk, for the Respondent, Product Tank Car Shops Limited (PROCOR),

ROBERT G. CRAGG, LL.B, for the Respondent, the Municipality of the County of Halifax.

DECISION

A hearing was held September 10, 1984, at the Expropriations Compensation Board Room, 1660 Hollis Street, Suite 904, in Halifax, on an appeal pursuant to Section 63(1) of the Planning Act by Riverlake Residents Association from a decision of the Council of the Municipality of the County of Halifax made April 2, 1984, which amended Appendix "C" of the Municipality's Zoning By-law 24 by zoning 3.6 acres of the lands of Product Tank Car Shops Limited at Windsor Junction from unzoned status to General Industrial (I-1) Zone. Notice of Appeal (Exhibit R-1) was dated April 11, 1984, and received by the Board April 12, 1984.

Prior to the Board commencing to hear the appeal on the merits, Counsel for the Respondent raised objections to the status of the Appellant, Riverlake Residents Association, and to the Board's jurisdiction to hear the appeal. Accordingly, the Board heard evidence on the standing of Riverlake Residents Association as an aggrieved person. Counsel for the Appellant and the Respondent presented oral argument and the Board agreed to render a decision on the jurisdiction issue before hearing the merits of the appeal. Following the hearing counsel for the Appellant and Respondent filed briefs with the Board.

Section 63(1) of the Planning Act states:

> "The amendment, revision or refusal by a council to amend or revise the land-use by-law may be appealed by
>
> a) an aggrieved person;
>
> b) the applicant;
>
> c) the Director;
>
> d) the council of an adjoining municipality."

The Planning Act, ch. 16, R.S.N.S. 1969, as amended, which remained in force until June 1, 1983, contained the following sections:

> "38(3) Upon the passing of a by-law amending, revising or repealing the zoning by-law the Council shall give notice of its passing by an advertisement in a newspaper circulating in the area affected; and a copy of the by-law together with proof of compliance with the requirements of this Section and all written

> objections to the by-law and a copy of the reports if any of the planning advisory committee if any or the district planning commission if any shall be filed with the Director within ten days of the passing of the by-law.
>
> (4) An interested person, the Director or the council of any other municipality may within thirty days of the publishing of the notice under subsection (3) appeal to the Board and the Board may:
>
> (a) confirm the decision of the council; or
>
> (b) confirm the decision of the council with respect to all or part of the land in issue subject to such conditions as the board may prescribe; or
>
> (c) reverse the decision of the council amending the zoning by-law."

Under that Act Riverlake Residents Association was recognized as "an interested person" in appeals before this Board and its predecessor, the Provincial Planning Appeal Board. The issue before the Board now is whether Riverlake Residents Association has standing before this Board as "an aggrieved person" pursuant to Section 63(1) of the present Planning Act in the matter of this appeal.

Counsel for the Appellant filed a copy of the constitution and by-laws of the Riverlake Residents Association (Exhibit R-3) and called the Chairman of the Association and the Chairman of the Planning and Development Committee of the Association to give evidence on the aims and involvement of the Association.

The constitution and by-laws of Riverlake Residents Association were unanimously approved December 6, 1975. They state, in part:

> "1. NAME OF ORGANIZATION
>
> 1.1 The organization shall be known as the 'Riverlake Residents' Association'.
>
> 2. GEOGRAPHICAL BOUNDARIES
>
> 2.1 The areas covered shall be Fall River and Windsor Junction.
>
> 3. PURPOSE OF ORGANIZATION
>
> 3.1 To do all those things that the Executive Committee in their absolute discretion deem reasonable.
>
> 3.2 The purpose of the organization shall be the promotion of those projects which have for their objective the improvement and betterment of the district in accordance with the wishes of the area residents and the existing municipal by-laws.
>
> 4. THE CONDUCT OF THE ORGANIZATION OF THE ASSOCIATION TO FULFILL ITS AIMS AND PURPOSES
>
> 4.1 All persons entitled to vote at an association meeting are those who are members of said association. Only real property owners shall be entitled to vote on measures which require levying or expending of real property tax money. A person's identity as a member with voting privileges, as defined in 5.2 terminates once he or she is removed from the district tax roll.
>
> 4.2 The general administration of the affairs of the association, between meetings, shall be vested in an executive committee, which shall consist of a Chairman, Vice-Chairman, Secretary, and Treasurer, who shall be elected by the members of the association at the annual or special meeting. As well, one executive member from each of Fall River and Windsor Junction, should those areas not be represented.
>
> 4.3 The annual meeting of the association shall be held the first Sunday of February and any special meetings will be determined by the Executive Committee. The fiscal year

shall be from February 1st to January 31st.

4.4 Notices of annual and special meetings that include proposals that are to be voted upon will be posted in five public places and sent to every householder in the district at least two weeks prior to the scheduled meeting. Failure by the association to mail a notice to every householder in the district shall not invalidate the proceedings of the scheduled meeting.

4.5 A quorum for an annual meeting of the association shall be five (5) members.

4.6 A quorum for special meetings shall be at least five (5) members.

4.7 The association shall be non-partisan and shall not be used for the dissemination of partisan principles, nor for the promotion of the candidacy of any person seeking public office or promotion.

4.8 The constitution may be amended by the association at any annual meeting with a 2/3 majority vote of the attending members.

5. MEMBERSHIP

5.1 Membership shall be open to all residents in the district as listed in Article 2.1.

5.2 Only real property owners shall be entitled to vote on measures which require levying or expending of real property tax money.

6. EXECUTIVE COMMITTEE

6.1 The general administration of the affairs of the association shall be invested in an executive committee which shall be elected from the association members.

6.2 The officers and executive members of the association shall consist of:

6.2.1 Chairman
6.2.2 Vice-Chairman
6.2.3 Secretary
6.2.4 Treasurer
6.2.5 One executive member from each of Fall River and Windsor Junction should those areas not be represented by one

of the following:
Vice-Chairman, Treasurer, Secretary.

6.3 The executive committee and members unless acting in bad faith shall not be held responsible for any decisions they may make."

....

"12 COMMITTEES

12.1 Committees not listed below may be appointed by the executive as required to study for and recommend to the association in all matters of particular interest to the association.

12.2 It is the general responsibility of all committees under the guidance of their individual chairman, to work for the betterment of the district and to put aside strong partisan feelings when they conflict with the aims of the association.

12.3 It is also the general responsibility of committees, through their chairman, to keep the executive, other committees or association itself, fully informed on all activities undertaken by that committee, and any new important activities that are planned for the future.

ORGANIZATION

CHAIRMAN

TREASURER VICE-CHAIRMAN SECRETARY

COMMUNITY SERVICES RECREATION PUBLICITY FINANCE

AREA DEVELOPMENT WATER, SANITATION AND HEALTY EDUCATION AND CULTURAL

MEMBERS-AT-LARGE"

....

"17. AREA DEVELOPMENT AND PLANNING

It is the responsibility of this committee to:

17.1 To plan and work with the appropriate government bodies and control the orderly

> development of the district.
>
> 17.2 Promote the beautification of the district.
>
> 17.3 Exchange information with various groups or organizations to ascertain facts of benefit and interest to the residents of the district.
>
> 17.4 Provide a liaison with appropriate government authorities and horticultural groups, to gain information to enhance district development.
>
> 17.5 Mediate public opinion and recommend appropriate action, concerning unsightly buildings, structures, goods, materials, etc., that mar the physical appearance of the community.
>
> 17.6 Advocate appropriate traffic control programs for the district.
>
> 17.7 Keep the executive and other committees informed of matters that will be of particular interest and value to them."

Graham Thomas, a resident of Eagle Point Drive, Windsor Junction, has been Chairman of Riverlake Residents Association for five years. The association is incorporated under the Societies Act and was formed to safeguard the environment from a proposed rock crusher to be located on property bordering on Three Mile Lake, according to Mr. Thomas. Mr. Thomas stated that the geographical boundaries of the association include Miller's Lake as well as Fall River and Windsor Junction. At the annual meeting of the Association officers are elected and a budget is proposed which if approved leads to the setting of an area rate. In 1984, the total approved budget of the Association was $35,000.00 which was supported by an area rate of $.06 on each $100.00 of assessment. A portion of the budget is allocated to planning matters. The Association also budgets for capital and operating expenses of the community centre located on Third Lake, for recreational programs, school crossing guards, senior citizens programs and for some items for schools within its territory, according to Mr. Thomas.

Mr. Thomas felt that the Association had "a proper grievance" because it acted "on behalf of the people for the community", i.e. the Association has an agency capacity or representative capacity for people that are aggrieved.

In cross-examination, Mr. Thomas acknowledged that under his chairmanship the executive of the Association had expanded in practice [from four] to seven persons, by the addition of committee chairmen. At least 7 persons attended the meeting at which it was decided to appeal the re-zoning of the PROCOR site. Mr. Thomas agreed that PROCOR had been a good corporate citizen and helpful to the Association over the past ten years with which he was familiar.

On the issue of whether or not the previous unzoned state of the PROCOR property was preferable to the I-1 zoning approved by Council, Mr. Thomas felt that the previous unzoned status of the subject property was more restrictive because the PROCOR operation was then a non-conforming use and therefore the existing industrial use was unable to expand. He stated that the Association felt aggrieved by Council's decision to alter the zoning of the subject site to make PROCOR'S industrial use a legal and conforming use. To Mr. Thomas the former unzoned status was preferable because the industrial use was contained by its non-conforming status.

Mr. David MacLean, a resident of Windsor Junction and

and the Chairman for the past 8 years of the Planning and Development Committee of Riverlake Residents Association stated that there had been an amendment approved at the last annual meeting of the Association to enlarge the executive to include committee chairmen, however, an amended constitution had not as yet been typed and so could not be filed in evidence. The constitution was also amended to recognize the takeover of the community centre by the Association several years previously. The community centre is located on approximately 10 acres of land deeded to it on Third Lake.

Mr. MacLean felt that industrial development on the subject site was necessary and wanted but that the Association was aggrieved because Council had not entered into a Planned Unit Development (PUD) Agreement with PROCOR but had instead rezoned the property I-1. He believed that a PUD agreement could have given the Association and the area residents it represents protection for local waterways and lakes. According to Mr. MacLean this was a long standing concern of the Association which had been expressed by the expenditure of many thousands of dollars by the association in previous years. Over the 8 years in which he has been chairman of the Planning Committee Mr. MacLean estimated that the Association had spent approximately $30,000.00 on planning matters. The budget for his committee was $8,000.00 in 1984 and had been $12,000.00 to $15,000.00 in 1983.

Both Counsel for the Appellant and Counsel for the Respondent PROCOR submitted briefs and rebuttal briefs following the hearing. Counsel for the Municipality declined to submit a brief stating that "the Municipality's position should not be an adversarial one" in such a matter, and that the issue of standing before the Board should most properly be dealt with by the party which raised the issue and by the party most affected.

Counsel for PROCOR cites various cases in which the term "aggrieved person" has been defined, the leading case in his opinion being Ex Parte Sidebotham [1880] C.D. 459. From that decision (page 465) he quotes the following:

> "...the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

In the light of that definition, Counsel for the Respondent PROCOR states that the decision of Council to rezone the subject property to an industrial zone appropriate to the land use which has been in operation for the past 25 years, has not wrongfully deprived the Association of anything or refused the Association something or affected the Association's title to something. Not having suffered a legal grievance he concludes that the Association does not qualify as a "person aggrieved".

Counsel for the Respondent PROCOR quotes from the decision of Robert Crean & Company Limited v. Dodds & Company [1930] S.C.R. 307 to illustrate that a loss of expected financial gain has been considered as a qualification for status as an aggrieved person. In this case the statutory right of appeal was set out in The Trade Mark and Design Act, R.S.C. 1927, at page 313 as follows:

> "The Exchequer Court...at the suit of any person aggrieved by any omission without sufficient cause to make any entry in the Register of Trade Marks...may make such order for...expunging any entry in any such Register as the Court thinks fit."

The issue in the above-noted case was a similarity in the trade marks of the Appellant and the Respondent with the Respondent claiming an interest in expunging the registration of the Appellant's trade mark so that the Appellant would not have the right to prevent the Respondent from registering its trade mark in Canada.

Counsel quotes from the decision at page 314:

> "If the right were exercised, it would injure the Respondent in respect of the royalties to be paid on sales made in this Country. The Respondent therefore, in my opinion, is a 'person aggrieved' within the meaning of the Statute."

Counsel for PROCOR argues that Riverlake Residents Association has not shown that its financial interests would be injured by the zoning of the subject lands.

Counsel for the Respondent PROCOR quotes from Ealing Corporation v. Jones [1959] 1 Q.B. 384, a case which dealt with a local planning authority attempting unsuccessfully to appeal as a "person aggrieved" from the quashing of an enforcement notice which it has issued. Two exerpts from the decision deal specifically with the term "person aggrieved", as follows:

(page 391)

> "If costs have been awarded in a case against a local authority, it is clear on the authorities that the local authority would be an aggrieved person; equally, if the result of the decision has been to put some legal burden on the public

> body concerned, that has been held to make a person aggrieved."
>
> (page 392)
>
> "The word 'aggrieved' connotes some legal grievance, for example, a deprivation of something, an adverse effect on a title to something, and so on...the local planning authority has simply been told that it cannot enforce the discontinuance of the present use of this land by the Appellant... It has been told in other words that the Appellant here has and always has had the right to go on using the land in a way in which he at present uses it, and so for the present, the development plan must be modified."

Two other cases, Lewvest Limited v. City of St. Johns and Scotia Development Limited [1981] 42 Nfld. and P.E.I. Reports, 186, and Halifax Atlantic Investment et al v. City of Halifax (1978) 28 N.S.R. (2d.) 193, are quoted by Counsel for the Respondent PROCOR to illustrate approval of the definition of "aggrieved person" as expounded in Sidebotham, Ealing and Buxton.

In conclusion, Counsel for PROCOR argues that the change made in the Planning Act to "aggrieved person" from the term "interested person" in the previous Planning Act, indicates an intent to confine the scope of standing to appeal to parties who have a legal grievance, which he claims the Association has failed to prove. Although he admits that the Association could bring itself within the definition of "aggrieved person" in Section 63(1) of the Planning Act in some situations, he contends that the evidence adduced by the Association in this hearing has failed to prove that the Association is indeed "an aggrieved person" in the matter of this hearing as required by the Act.

Counsel for the Appellant submitted a lengthy brief arguing with quotations and example that the term "aggrieved person" is capable of an expanded interpretation and that this wider, more contemporary definition of the term would be applicable to the Association in this appeal. Counsel for the Appellant opens his argument with his summary of the difficulties presented by the term "aggrieved person" as follows:

> "The term 'aggrieved person' or 'aggrieved party' is a nebulous term which has been subject to widely differing interpretations depending on the context in which it has been used. 'Aggrieved person' in an Administrative Law context is normally defined differently than the same term used in Criminal Law, Constitutional Law, or Civil Law. Also, the term 'aggrieved person' as used in a statute, such as the Planning Act, is normally subject to a different interpretation than the same term used in the Common Law context when defining the status of an Appellant applying for a perogative writ such as Certiorari, Mandamus or Prohibition."

Counsel for the Association cites four definitions of the term as follows:

> "Aggrieved party - one whose legal right is invaded by an act complained of or whose pecuniary interest is directly affected by a decree or judgment. One whose right of property may be established or divested. the word 'aggrieved' refers to a substantial grievance, or denial of some personal or property right, or the imposition upon a party of a burden or obligation."
>
> Black's Law Dictionary, 5th Edition
>
> "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudiciously affects his interests." (see A.G. of the Gambia v. N'Jie, [1961] 2 All E.R. 504).
>
> Words and Phrases Legally Defined, Volume 4,
> Butterworths, London, 1969

> "The question of who is an aggrieved person has been the topic of numerous decisions and I take it to mean a person who has had his legal rights infringed or one who has a substantial interest in over-turning [an Order]." (See Re Prince Edward Island Health Services Commission an Appeal Board (1979), 95 D.L.R. (3d) 684.)
>
> Words and Phrases Legally Defined, Supra, 1983 Supplement.

> "In context of Administrative Procedure Statute, 'aggrieved' means something more than being dissatisfied with agency's order, yet distinct from being adversely 'affected' by it, and whatever may be reach of 'person aggrieved' in different settings, it includes one whom agency itself, pursuant to statutory directive, has recognized to present interest that legislature wished to have considered." (see Application of Portland General Electric Company, 561 P. 2d, 154.)
>
> Words and Phrases Legally Defined, Supra, 1984 Supplement.

Counsel for the Appellant argued that the definition of a person aggrieved in both Ex Parte Sidebotham and Buxton "has effectively been overruled or severely limited." In support of that view he cites the following cases:

> Attorney-General of the Gambia v. N'Jie [1961] 2 All E.R. 504;
>
> Maurice v. London City Council [1964] 2 Q.B., 378;
>
> Regina v. Liverpool Corporation Ex Parte Liverpool Taxi Fleet Operators' Association and Another v. Secretary of State for Environment and Another 28 P & C.R. 136-137.

Counsel for the Appellant quotes Lord Denning in Maurice v. London City Council referring to his previous decision in Attorney-General of Gambia v. N'Jie as follows:

> "I know that at one time the words 'person aggrieved' (which I regard as the same as 'person who shall deem himself aggrieved' were given in these courts a very narrow and restricted interpretation. It was said that the words 'person aggrieved' in a statute

> only meant a person who suffered a legal grievance. Indeed in Buxton v. Minister of Housing and Local Government, which I mentioned in the course of argument, Salmon J. declined to go into the question of loss of amenities. But that narrow view should now be rejected. In the most recent case of Attorney General of the Gambia v. N'Jie the Privy Council had to consider these words 'person aggrieved' once again. On behalf of the Board, I venture to say there: 'the words "person aggrieved" are of wide import and should not be subject to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudiciously affects his interests.' So here in this case they do include a person who has a genuine grievance because a consent has been given which prejudiciously affects his interest. His interest may be prejudiciously affected, not only in regard to light and air, but in regard to amenities also..."

Counsel for the Appellant cites three major constitutional law cases decided by the Supreme Court of Canada to support his argument that there is a trend toward a wider definition of "aggrieved person". The cases are:

> Thorson v. Attorney-General of Canada, 43 D.L.R. (3d) 1;
>
> Nova Scotia Board of Censors v. McNeil, 5 N.R. 43;
>
> Bedford Service Commission v. Attorney-General of Nova Scotia and the Halifax-Dartmouth Regional Authority, 19 N.S.R. (2d) 310.

Thorson involves a challenge to the constitutional validity of The Official Languages Act, McNeil involves a challenge to the constitutional validity of the Nova Scotia Board of Censors, and Bedford Service Commission involves the right to commence a declaratory action against the Province of Nova Scotia. Counsel for the Appellant argues that the liberal interpretation to standing in Thorson and McNeil has been subsequently applied in three administrative law cases, i.e.

> Re Vladicka, [1974] 4 W.W.R. 159;
>
> Stein v. City of Winnipeg, [1974] 4 W.W.R. 484;
>
> Brodie v. City of Halifax [1975]
> 9 N.S.R. (2d.) 380.

In the opinion of the Board the three above-noted cases do not assist in the determination of whether Riverlake Residents Association qualifies as an Appellant in the statutory right of appeal provided for in Section 63(1) of the Planning Act. Vladicka, Stein and Brodie each involve a challenge to the validity of actions by a municipal council or board of school trustees which were alleged to be without legal authority. The common element in these cases is an alleged excess of legislative power for which a prerogative remedy was sought. In the Board's opinion the wider interpretations of standing by the Supreme Court of Canada quoted in Vladicka, Stein and Brodie are supportive only of the rights of Appellants to be considered "aggrieved persons" where the issues are constitutional or where prerogative remedies are sought. As Counsel for the Appellant stated in his brief:

> " 'Aggrieved person' in an Administrative Law context is normally defined differently than the same term used in Criminal Law, Constitutional Law or Civil Law. Also, the term 'aggrieved persons' as used in a Statute such as the Planning Act, is normally subject to a different interpretation than the same term used in the Common Law context when defining the status of an Appellant applying for a prerogative writ such as Certiorari, Mandamus or Prohibition."

Counsel for the Appellant argues that the case of Heritage Trust Nova Scotia, Federation of Museums, Heritage and Historical Societies of Nova Scotia, Community Planning Association of Canada (Nova Scotia Division), Pacey, Pacey and Redmond v. Provincial Planning Appeal Board and City of Halifax and Canterbury Group Limited (third party) 50 N.S.R. (2d.) 352 is one in which it was not required "that the plaintiffs show infringement of any legal rights, any direct pecuniary interests, or any particular prejudice beyond that of the public as a pre-requisite to being accredited standing as "aggrieved persons"." The Board again notes that the plaintiffs in this case were making application for Certiorari and were not attempting to qualify themselves as "aggrieved persons" within the provisions of Section 63(1) of the Planning Act.

Counsel for the Appellant cites the case of Saanich Inlet Preservation Society v. Cowichan Valley Regional District, 2 Admin. L.R. 12 as an example of a western Canadian case in which ratepayers associations and citizens' groups have been allowed to challenge the validity of a zoning by-law. This particular case dealt with a situation of "interested persons" and did not in fact deal with the term "aggrieved persons" and so is of little value in the Board's determination of the issue before it.

Counsel for the Association argues that Administrative Law texts indicate a trend toward liberalizing standing requirements. He quotes from deSmith's Judicial Review of Administrative Action and from Wade's Administrative Law. The quotations from deSmith are from a section entitled Locus Standi and the Problem of Discretion with the subtitle of Locus Standi in Administrative Law.

This Section and Subsection are both contained in a chapter entitled Certiorari and Prohibition. The Appellant however, in the issue before the Board, is not applying for a judicial remedy such as certiorari or prohibition but rather is attempting to establish its standing as an Appellant pursuant to the statutory right of appeal set out in the Planning Act. The Appellant is not making an application for a prerogative remedy in which standing may be granted at the discretion of a court.

Counsel for the Appellant argues at length on legislative intention as it relates to the term "aggrieved person" in the Planning Act which came into force June 1, 1983. He notes that the term is not defined in the interpretation section of the Act. He quotes extensively from various reports and drafts of the Planning Act which preceeded its passage and chronicles the various recommendations on who should have the right to appeal certain decisions under the Act which ranged from "interested person" to "a person who considers himself aggrieved" to "aggrieved person". The Board is of the opinion that regardless of the history of the evolution of the qualifications of an Appellant, the term "aggrieved person" was eventually approved by the legislature, and that is the only term to be considered by the Board.

Counsel for the Appellant quotes from Hansard to demonstrate the expressed intentions of the Minister of Municipal Affairs at the time of passage of the Planning Act, arguing that "if a term is ambiguous, such as the term "aggrieved person" is, then the judge, board, or tribunal, must consider the intention of the legislation in which the term is used, and determine its meaning looking at the purpose and intent of the statute as a whole." The Board is of the opinion, as stated previously in a decision on an appeal by the Lebanese Association of Nova Scotia, dated February 21, 1984, that "the debates of the House of Assembly are not in law relevant evidence to prove the fact of what the intent of the legislature was at the time of the passing of the legislation and are therefore inadmissible."

Counsel for the Appellant quoted extensively from the Canadian Legal System, 2nd edition, by Gerald A. Gall, from a section entitled "The Problem of Ambiguity: Determining Legislative Intent." This quotation covers "the three major canons of construction" and three "more or less grammatical rules of construction" as follows:

> "1. Rules of Construction
>
> The fundamental rule in interpreting ambiguous statutes is that a judge must ascertain the intent of the legislature in enacting the statute. Legislative intent is one of the many fictions throughout the law that serves a useful purpose. Another example of a legal fiction arises in the law of negligence, where in order to determine whether a defendant has breached a standard of care, we resort to an objective test: whether the defendant has conducted himself in accordance with the standard expected of a "reasonable man." In reality, of course, there is no such person who is reasonable in all circumstances and in all situations. Likewise, in reality there is no such single or, for that matter, collective legislative intent in any legislative body. There are opposition parties who do not share the same political views as the government in respect of a given piece of legislation; there are backbenchers of the governing party who do

not share the views of the government in respect of a particular piece of legislation but do not complain owing to the dictates of party discipline; there may even have been dissent within the cabinet in discussions preceding the introduction of a piece of legislation. However, notwithstanding its somewhat artificial nature, the notion of legislative intent must be regarded as another one of those legal fictions which serve a useful purpose.

In order to determine the intent of the legislature in enacting a given ambiguous statute, a judge may resort to one of the three major canons of construction. First, the "literal" or "plain meaning" rule requires that if the precise words used are plain and unambiguous, the judge is bound to contrue [construe] them in their ordinary sense, even though such a construction might lead to an absurdity or a manifest injustice. The corollary of the above is that any legislative omissions or errors are not to be inferred. Secondly, the "golden" rule requires that, in interpreting an ambiguous statute, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistencey with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified only so far as to avoid that absurdity and inconsistency. Finally, the "mischief" rule requires that, in interpreting an ambiguous statute, the judge must consider four things: First, what was the common law before the making of the Act? Secondly, what was the mischief and defect for which the common law did not provide? Thirdly, what remedy did the legislature resolve upon to cure the mischief and defect? Finally, what was the true reason for the remedy? After entertaining those four questions, the judge must then construe the legislation so as to suppress the mischief and advance the remedy. The above definitions of the three canons of construction are taken from various early cases but they have been restated many times in various forms.

....

In addition to these three canons of construction, there are three more or less grammatical rules of construction. These rules, usually expressed in Latin, are as follows. First, the " Nosciture a sociis" rule is that a general word, following a group of specific words, takes its meaning from those specific words. Similarly, if an ambiguous general word is followed by specific words, the ambiguous word takes its meaning from those words that follow it. For example, in one case it was held that the word "interest" in the phrase "interest, annuities, or other annual payments" means annual interest.

The second grammatical rule of construction is the "ejusdem generis" rule. It is very similar to the previous one and, in fact, some writers have suggested that they both are the same. This rule is that a general phrase (rather than a general word as in the previous rule) takes its meaning from the specific words that precede it. For example, if a statute contained a provision to the effect that "no dogs, cats or other animals may wander in public places without being controlled by means of a leash," under this rule the general phrase "or other animals" would take its meaning from the preceding specific words, with the result that it would probably be interpreted to mean a domesticated animal, rather than, for example, wild game.

The third grammatical rule of construction is the "expressio unius, exclusio alterius" rule. Under this rule, the express mention or inclusion of one word or phrase implies the exclusion of another word or phrase. A good example of this rule was set out by John Willis in an article entitled "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1 at 8 is as follows:

> If I have living in my house my wife, my children, two old aunts and my mother, and a friend says "Bring the family to our picnic, Sunday", what does he mean by "family"? -- my wife and children only, or my whole menage? If he adds, "Your mother comes under that heading, you know", by specially mentioning my mother he shews, it may be said, that he was using "family" in the narrow sense of "wife and children": result, the aunts are not invited--expressio unius, exclusio alterius, the express mention of one person or thing implies the exclusion of other persons or things of the same class not mentioned.

> Willis then concludes, as many others have concluded that this rule of construction is unreliable and is very rarely applied by a court. However, see the recent case of Crease v. Metro Toronto Police Commrs. Bd. (1976), 11 O.R. (2d) 459, 66 D.L.R. (3d) 403, in which the rule was applied. See also R. v. Baig, 23 O.R. (2d) 730 (Dist. Ct.)."

Having outlined in detail (above) the rules of construction for interpretation of ambiguous statutory provisions, Counsel for the Appellant draws conclusions about the legislative intent in the term "aggrieved person" not from the wording of the Statute itself but from the previously quoted Planning Act Review Committee working papers and statements made by the Minister of Municipal Affairs at the time of the passage of the Planning Act. From the three canons of construction and the three grammatical rules of construction as quoted from Gall (above), Counsel for the Appellant chose only the "mischief rule" and the "ejusdem generis" rule to apply to the facts which he had previously stated. He concluded that if one applied the mischief rule one would assume that the prevention of "frivolous and vexations appeals which would unnecessarily delay developments and subject developers to unnecessary financial expenditure", was the mischief that the change in Statute from "interested person" to "aggrieved person" was meant to prevent. Applying the "ejusdem generis rule", he concluded that "taking into account the stated purpose of the new Planning Act ....[of] entrenching public participation in all phases of the planning process, then it is clear the term "aggrieved person" was not meant to bar the public from an integral part of the planning process such as the right to be heard before the Municipal Board."

The Board cannot agree with the last statement by Counsel for the Appellant. The stated purpose in the Planning Act relating to public participation occurs in Section 2(c) as follows:

> "[The purpose of this Act is to]
>
> (c) establish a consultative process which will ensure the right of the public to have access to information and participate in the formulation of policies, regulations, strategies and by-laws, including the right to be notified and heard before decisions are made under this Act;"

As the Board reads that section, the emphasis appears to be primarily on public participation in the preparation and approval of Municipal Planning Strategies and Land-Use By-laws ("policies, regulations, strategies and by-laws"...). "The right to be notified and heard" may refer to the policy, regulation, strategy and by-law development and approval process only, or may by extension be intended to apply to other "decisions made under this Act", e.g. the approval or refusal by a Council to approve amendments to a Land-Use By-law.

The Planning Act clearly states that a Municipal Council, when considering an application to amend a Land-Use By-law "shall hold a public hearing at which oral and written submissions are received "(Section 42(1)). No limitations are set on the status of those who may make oral or written submissions to Council. Those who may appeal Council's decision, however, are restricted by Section 63(1) of the Planning Act to an aggrieved person, the applicant, the Director or the council of an adjoining municipality. The previous Planning Act also restricted those who were eligible to appeal a similar decision to "an interested person, the Director, or the Council of any other municipality". Although the definitions of who may appeal vary, both Acts restrict the right to appeal a Council's amendment or refusal to amend a Land-Use By-law to certain categories of persons. The right to be heard before the Municipal Board is not in question, it is the right to achieve standing as an Appellant which is at issue. "Public participation in all phases of the planning process", (Counsel's words), does not extend to an unrestricted right of appeal for each and every citizen, in either this Planning Act or its predecessor.

Counsel for the Appellant argues that "aggrieved person" is synonymous with a person with a "real and substantial interest" in the subject matter, a reference to Section 27(4) of the Municipal Board Act which states:

> "(4) The Board shall permit any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceeding to participate in the hearing."

Counsel for the Association refers to argument made by Counsel for the respondent PROCOR in a submission to the Board in the ATC Properties Limited appeal, in which he argued that the term "real and substantial interest" should be as restrictively interpreted as the term "person aggrieved". Counsel for the Appellant agrees that the terms are analogous but submits that "the term 'person aggrieved' be less restrictively interpreted to mean any person or party with a "real and substantial interest"..... in the matter before the Board."

The Board has already expressed its opinion on the linkage between an "aggrieved person" and a person with a "real and substantial interest" in its decision on the ATC Properties Limited appeal noted above. At page 217 of that decision (August 10, 1984) the Board stated:

> "The Board exercised its discretion under S.S.(3) of Section 27 and permitted the three groups in question to participate. While it is not necessary in this case for the Board to determine whether or not the three groups are persons having a real and substantial interest in the subject matter of the proceedings, it is the Board's opinion that it is possible for a person to have a real and substantial interest in proceedings before the Board but this person is not necessarily in the category of "an aggrieved person.""

Counsel for the Appellant argues that "geographic proximity" is a determinant in whether a person or party has a "real and substantial interest", except where the issues have a regional or provincial interest such as the preservation of Citadel Hill. This issue before the Board is whether the Appellant qualifies as an aggrieved person and therefore has standing as an Appellant pursuant to the statutory right of appeal set out in the Planning Act. The issue is not whether the Appellant has a real and substantial interest in the proceedings or whether the zoning of the Procor property is of regional interest or provincial interest.

Counsel for the Appellant argues that the Canadian Charter of Rights and Freedoms, Section 7, although silent about property rights, protects "security of the person" and that any decision which affects or could affect the physical or mental health of an individual or individuals also affects his or their "security of the person" and therefore those persons should have the right to appeal such a decision. The Board rejects this argument being unaware of any such interpretation of this section of the Charter of Rights by any court of competent jurisdiction.

Counsel for the Appellant further argues that the Canadian Bill of Rights in Part 1, Section 1(a) provides for the protection of the right to the "enjoyment of property and the right not to be deprived thereof except by due process of law" and so the Appellant should not be deprived of the right to be heard before this Board. Once again, pursuant to Section 63(1) of the Planning Act, to be an Appellant in this matter, one must be an aggrieved person, the Applicant, the Director or the Council of an adjoining municipality. Only those categories of persons are qualified to be Appellants, and the Association must establish that it is an "aggrieved person" in the matter of this appeal in order to be heard by the Board.

Counsel for the Appellant argues that it is an aggrieved person because as the recognized ratepayers association for the communities of Windsor Junction and Fall River, it makes decisions on expenditures of money raised by an annual area rate for recreation, health and sanitation, education and culture, community services and area development and planning. The Association has held planning seminars and organized a survey of residents' wishes in conjunction with the Community Planning Association. The Association is working with the District 14 Public Participation Committee on the development of a Municipal Planning Strategy for the area. Also the

Association has appeared before this Board, the former Provincial Planning Appeal Board, the Public Utilities Board and the Nova Scotia Environmental Control Board, and has participated in numerous public hearings before County Council - all primarily on planning issues. [The appeal by the Appellant to this Board was under the former Planning Act in which the criterion for an Appellant was an "interested person"].

All of the above, Counsel argues, demonstrates a "real and substantial interest" by the Appellant in the planning and development of the Windsor Junction - Fall River area. The Board does not dispute the Association's consistent and demonstrated commitment to planning issues. Such a "real and substantial interest" in planning, however, does not necessarily equate to the status of an "aggrieved person" in this appeal.

Counsel for the Appellant argues that even if a restricted definition of "aggrieved person" is accepted by the Board, the Association would qualify as an "aggrieved person" as follows:

> "The Association does have a 'pecuniary interest' in the matter before the Board in that it funds planning efforts in the community and also funds recreational activities which could be adversely affected by the proposed zoning. Furthermore, it is 'directly affected' as the zoning is for a parcel of property within its area of jurisdiction, and is near or adjacent to water bodies or other parcels of land which are used for recreational purposes and, in relation to the lakes, sources of domestic drinking water. And, lastly, the Association is affected more than the general public, if one defines 'public' as being residents of the Municipality of the County of Halifax or of the Province of Nova Scotia, as the impact on abutting properties and area lakes will be felt by the Association and its residents but might not have any significant impact on residents of Timberlea or Sydney."

In coming to a conclusion on whether the Appellant is an "aggrieved person" in the matter of this appeal, the Board has considered the spectrum of interpretations of the term "aggrieved person" cited by Counsel for both the Appellant and PROCOR. Many of the most liberal interpretations of "aggrieved person" have been found in cases which the Board does not believe to be similar to the matter now before it. Appeals on constitutional issues to the Supreme Court of Canada and applications to a Court for certiorari and other judicial remedies are not analogous to an appeal before a tribunal such as this Board from a statutory right of appeal provided by the Planning Act.

The Planning Act requires that an Appellant, pursuant to Section 63(1) be an "aggrieved person". The former Planning Act required that an Appellant of a similar decision be an "interested person". The Board concludes that notwithstanding that a stated purpose of this present Act is to establish the right of the public "to be notified and heard before decisions are made under the Act", the change of criteria for an Appellant from "interested person" to "aggrieved person" can be construed no other way than as an intention to restrict to some degree those who have the right to appeal this type of decision. The issue then becomes the degree to which the term "aggrieved person" is more restrictive than the term "interested person", and whether or not the Association meets this test.

Counsel for the Appellant states that "even if the Board were to accept the very restricted definition of "aggrieved person" as suggested for counsel for PROCOR, it is submitted that the Riverlake Residents Association also meets this definition of "aggrieved person". The two most restrictive definitions of "aggrieved person" quoted to the Board are from Ex Parte Sidebotham and from Black's Law Dictionary as follows, respectively:

> " A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, wrongfully refused him something, or wrongfully affected his title to something."
>
> [an aggrieved party is]
>
> "one whose legal right is invaded by an Act complained of or whose pecuniary interest is directly affected by a decree or judgment. One whose right of property may be established or divested. The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation."

The Board finds it difficult to accept that the decision of Council which zoned the subject property in accordance with its longstanding use has wrongfully deprived the Appellant of anything, wrongfully refused it anything or wrongfully affected its title to anything. Mr. Graham Thomas, President of the Association, expressed a personal sense of grievance at the removal of the restrictions of PROCOR'S previous non-conforming status by the industrial zoning of the subject property. Whether such a personal sense of grievance on the part of some or all members of the Executive of the Association can be extended to the Association becoming an "aggrieved person" seems decidedly doubtful to the Board. If the restrictions on the Respondent PROCOR resulting from its property's non-conforming status were the thing which the Association had been wrongfully deprived of, one would assume the Association could substantiate an active interest in the imposition or continuation of those restrictions. The Board heard no such evidence. The Association came into existence ten years ago; the Respondent has been in operation on the subject property for 20 - 25 years; PROCOR was in operation prior to the coming into force of the I-1 General Industrial Zone which gave it non-conforming status; the Board is unaware of whether or not this event pre-dated the establishment of the Association.

Council refused to agree with the Appellant that the subject property should not be zoned I-1 General Industrial, but there was no suggestion to the Board that Council denied the Appellant the right to express its opposition to the proposed zoning. The Appellant holds title to lands used for recreation purposes on Third Lake, not far from the subject property. Third Lake drains into Three Mile Lake on which the PROCOR property is located. The President of the Association stated that it had no complaints with PROCOR so the Board assumes that the property owned by the Appellant has not been adversely affected by the existence of the Respondents' operation these past 10 years. The Community Centre and adjoining swimming beach on Third Lake are unlikely to be affected by any other allowable industrial operation on the subject site since the direction of water flow is away from the Appellant's property. Counsel for the Appellant argued that the Appellant had a pecuniary interest in the matter before the Board because it expends funds for planning projects and recreational activities in the community which could be adversely affected by the industrial zoning of the subject property. The past and current planning involvement of the Appellant as cited includes appeals, citizen surveys and membership in the Public Participation Committee developing a municipal planning strategy for the area. The Board heard no persuasive evidence that the money spent by the Association on those activities would be directly affected by Council's decision. The recreational activities funded by the Association took place principally at the Community Centre on Third Lake. Again, the Board heard no persuasive evidence that the recreational activities would be directly affected by Council's zoning of the subject property.

In the opinion of the Board, the Appellant does not have a legal grievance in this matter, it has not been denied some personal or property right or had imposed upon it a burden or obligation and therefore is not an "aggrieved person" in the matter of this hearing.

Throughout the evidence at the hearing and in post-hearing briefs, Counsel for the Appellant argued that the Association represents the interests of individual residents of the Windsor Junction - Fall River area and acts on their behalf, i.e., any individual who may be aggrieved by Council's decision to zone the subject lands Industrial is represented by the Appellant. In the Appellant's Constitution and By-laws, the purpose of the organization is set out as follows:

> "3.1 to do all those things that the Executive Committee in their absolute discretion deem reasonable.
>
> 3.2 The purpose of the organization shall be the promotion of those projects which have for their objective the improvement and betterment of the district in accordance with the wishes of the area residents and the existing municipal by-laws."

In the opinion of the Board, the Appellant is limited in its purposes to those stated in its Constitution. An assumption by the Association of an agency capacity or representative capacity for its members who are aggrieved may well have evolved in practice but is not substantiated by the stated purpose of the organization.

The Board does not deny that there may be individuals who might meet the statutory requirement of Section 63(1) of the Act to be aggrieved persons in the matter of this appeal, or that the Appellant might itself meet the statutory requirement in another appeal. In the matter of this appeal, however, the Board is of the opinion that the Appellant has not shown that it is an "aggrieved person" by reason of having suffered a legal grievance or the imposition of a burden or obligation, or by reason of a denial of some personal or property right.

The Board agrees with Coffin, J.A. in his decision in Halifax Atlantic Investments Ltd., Lord Nelson Hotel Ltd., Armdale Motel Ltd. v. City of Halifax 28 N.S.R. (2d) 193, when he states at Page 214 after an extensive examination of cases in which the term "aggrieved person" was considered:

> " After a review of the authorities, it is my opinion that the facts must be within the reasoning of such cases as Ex Parte Sidebotham before a person can bring himself within the statutory meaning of a party aggrieved."

It is not sufficient for the Association to claim that if any of its members are aggrieved, it has the capacity to represent them, and therefore is itself an aggrieved person. Only if the Appellant as an entity itself is aggrieved would it achieve status as an aggrieved person.

The Appellant not having proven its standing as an aggrieved person pursuant to Section 63(1) of the Planning Act in the matter of this appeal, the appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 30th day of April, 1985.

E Lawrence

ELIZABETH LAWRENCE

Wallace, MacDonald and Lively Ltd. and Tolson v. Town of Bedford

PLANNING--CONTRACT ZONING--DEVELOPMENT AGREEMENT--REFUSAL TO PERMIT TWO STOREY OFFICE BUILDING--CONSISTENCY WITH M.P.S.--PLANNING ACT, SS.72(1),(4), 113--TOWN OF BEDFORD M.P.S., POLICIES R-2, T-9, Z-1, Z-2, Z-4

This is an appeal from a decision of the Council of the Town of Bedford refusing to enter into a development agreement to permit the construction of a two storey office building with outside parking facilities for 47 vehicles. The subject property, on Union Street, is zoned R-1 and the area in question is primarily used for residential purposes, although the subject property is utilized as a warehouse and trucking operation, which is a legal non-conforming use. It is designated "Commercial" on the Generalized Future Land-Use Map, which is part of the Town of Bedford's Municipal Planning Strategy (M.P.S.).

HELD: The appeal is dismissed.

Pursuant to s.72(4) of the Planning Act, the issue in this appeal is whether the decision of Council in refusing to enter into a development agreement cannot be said to be consistent with the intent of the Town's M.P.S. The Board must of necessity consider the proposed development in relation to the M.P.S. as a whole. The subject property is zoned R-1 and most of the properties on Union Street are in fact occupied by single family dwelling residences. The residents of Union Street are strongly opposed to the construction of an office building on the subject site. The present legal non-conforming use would not be considered a use compatible with the residential uses and residential zoning in effect on Union Street. The proposed 15,000 sq. ft., two-storey office building is not compatible with the adjacent residential uses, primarily single family dwelling uses, in terms of the use, bulk and scale of the proposal. Because the subject property is shown as "Commercial" on the Town's Generalized Future Land-Use Map does not in itself oblige Council to necessarily approve an application which would allow some type of commercial use. There may well be individual cases where a proposed development would involve a commercial use compatible with the existing uses to some reasonable degree and therefore be reasonably within the intent of the M.P.S. and should be approved. Presumably this would not be a highly intensified commercial use and would have provision for buffering, screening and access control to reduce potential incompatibilities. The burden or onus is on the Appellants to demonstrate that the decision cannot reasonably be said to be consistent with the intent of the M.P.S. The Appellants have not discharged this onus.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1983, c. 9;

- and

IN THE MATTER OF: An Appeal by WALLACE, MacDONALD & LIVELY LIMITED and ELSIE TOLSON from the decision of the Council of the Town of Bedford made on October 24, 1984, refusing to enter into a development agreement respecting a portion of the property known as No. 26 Union Street, Bedford.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: DAVID F. ENGLISH, LL.B, and JACK A. INNES, Q.C., for the Appellants;

KENNETH A. MacINNIS, LL.B, for the Town of Bedford.

DECISION

This is an appeal by Wallace, MacDonald & Lively Ltd., and Elsie Tolson, under Section 72(1) of the Planning Act, Statutes of Nova Scotia, 1983, c. 9, from the decision of the Council of the Town of Bedford made on October 24, 1984, refusing to enter into a development agreement to permit the construction of a two storey office building on a portion of the property known as No. 26 Union Street, Bedford and more particularly designated as Lot "C" on a Plan of Subdivision of lands of Elsie Margaret Tolson dated August 1, 1984, certified by Alfred E. Wallace, N.S.L.S.

The application for approval of a development agreement was made by the Appellant, Wallace, MacDonald & Lively Ltd.

and is dated September 4, 1984. A photocopy of this application was filed as item No. 8 in Exhibit B-9. This application states that the name of the property owner is Elsie Tolson, the other Appellant. Elsie Tolson, the owner of the subject lands signed an authorization dated September 4, 1984, stating that she had requested A.E. Wallace of Wallace, MacDonald & Lively Ltd. to proceed on her behalf with an application to the Town of Bedford for the subdivision and re-zoning of a portion of her lands at 26 Union Street. A copy of this authorization appears as item 11 of Exhibit B-9.

The Appellants' Notice of Appeal is dated November 9, 1984, and was received by the Board on November 9, 1984, and is filed as Exhibit B-1. This Notice of Appeal sets out the following grounds of appeal, viz:

> "1. That the proposed Contract Development Agreement is consistent with the intent of the Municipal Development Plan (Municipal Planning Strategy) of the Town of Bedford.
>
> 2. Is in conformance with the generalized future land use designation as provided for in the Municipal Development Plan.
>
> 3. Such other grounds as may appear at the hearing of the matter."

At the request of the Board the Appellants filed an Amended Notice of Appeal dated November 23, 1984, received by the Board on the same date. The Amended Notice of Appeal identifies the precise lands (Lot "C") to which the proposed development agreement relates. The Amended Notice of Appeal also indicates the nature of the proposed development agreement.

The Notice of Hearing prepared by the Board was advertised in the Daily News by three insertions on January 14th, 21st and 28th, 1985. Mr. English filed his own Affidavit (Exhibit B-5) setting forth the names and addresses of those persons to whom he mailed a copy of the Notice of Hearing in compliance with the Board's instructions.

Evidence was given by Mrs. Cherie Winters, Alfred E. Wallace, William Richards, Frederick V. Hall, Donald McCarthy, Shirley Towill, Graeme Fraser, Vernon Banks, Catherine Lewis, Alfred Smith, Morton Kelly, Francene Cosman, Mary McNeil, Ann Wilkie, Deborah Cook, Margaret Chapman, Barry Zwicker, Joan Pryde, Paul R. Paynter, Ronald Singer, John M. Towner, and Sydney J. Langmaid.

The subject property (Lot "C") is situate on the north west side of Union Street, a dead-end street, terminating at its northern limit at a large parcel of land having frontage on Bicentennial Drive, a limited access highway. Both sides of Union Street are zoned Residential Single Family (R-1). Union Sreet at its southerly end joins the Bedford Highway. The subject lot containing 29,175 square feet is shown on a plan of survey of subdivision of lands of Elsie Margaret Tolson into Lot "R" and Lot "C" and Parcel "E". There are two buildings located on Lot "C". This plan of subdivision has not received approval from the Development Officer for the Town of Bedford. A copy of the plan is filed as Exhibit B-14. The area in which the subject lot is situate is primarily used for residential purposes although the subject property is utilized as a warehouse and trucking operation which constitutes a non-conforming use of the land. The subject land is designated "Commercial" on the Town's Generalized Future Land-Use Map which is part of the Town's Municipal Planning Strategy (M.P.S.). The M.P.S. was filed as Exhibit B-7. A copy of the Town's Land-Use By-Law was filed as Exhibit B-8.

The Appellants propose to construct a two storey office building containing 15,000 square feet of gross floor area with designated parking spaces for 47 vehicles. The developer proposes to construct a sidewalk around two sides of the building as well as a 5' wide concrete sidewalk along the frontage of the lot. At the present time there are no sidewalks on Union Street. It is proposed that the lot to the rear of the subject lot (Lot "R") would be used to build a single family residence.

Under s.s. (4) of Section 72 of the Planning Act the Board is directed not to interfere with a council's decision made pursuant to Section 72 "unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy" (M.P.S.). Thus the issue in this appeal is whether the Council's decision in refusing to enter into a development agreement with the Appellants cannot reasonably be said to be consistent with the intent of the Town's M.P.S.

It is to be noted that the Town of Bedford adopted a Municipal Development Plan (M.D.P.) prior to the enactment of the present Planning Act, 1983 Statutes of Nova Scotia, Chapter 9.

Under Section 113 of the present Planning Act, "a municipal development plan and zoning by-law passed under the former Planning Act are and are deemed to be a municipal planning strategy and land-use by-law, respectively, within the meaning of this Act, to the extent to which they are consistent with this Act."

The Board having been satisfied that the Appellants have carried out all the preliminary requirements of the Planning Act proceeded to hear the appeal on the merits.

Mrs. Cherie Winters, the daughter of Elsie Tolson, one of the Appellants was the first witness called by the Appellants. She stated that the subject property had been purchased by her father Richard F. Tolson in 1939. He was then engaged in the coal business. Mrs. Winters who is a school teacher and has lived in Bedford most of her lifetime to date identified Exhibit B-10 which is a series of photos showing properties on both sides of Union Street from the Bedford Place Mall to the Bedford Highway. Photos numbered 7, 8, 9, and 10 show the property known as No. 26 Union Street. She also identified Exhibit B-12 as the photocopy of a 1956 photo of a portion of the subject property showing a building occupied by her father's coal business. This Exhibit indicates that the property in question was subject to flooding from the Sackville River. She stated that the existing use of the buildings on the property is by Robinson Bros. Express Ltd. It would appear from the evidence of Mrs. Winters that the subject property had been used for commercial purposes since 1939.

The next witness for the Appellants was Alfred E. Wallace, one of the principals in the survey firm of Wallace, MacDonald & Lively Ltd., one of the Appellants. He had made the application to the Town for the proposed development agreement. His firm had been doing business in Bedford for about 12 years and is presently located at No. 1350 Bedford Highway and employs 22 persons. He identified Exhibit B-17 as a drawing showing the elevations of the proposed two storey building which would contain 7,500 square feet on each floor. His firm proposed to occupy 4,000 to 5,000 square feet on the second floor and the balance would be rented out as office space. He indicated his firm required space for expansion and desired to remain in Bedford. He had met with Mr. Barry Zwicker, the Town's Development Officer when looking for a suitable site. He had a number of meetings with Town staff. He identified Exhibit B-13 as a plot plan prepared by his firm showing lands of Mrs. Elsie Tolson divided into three parcels, Lot "C" being the subject site and Lot "R" being a lot to the rear of Lot "C" on which he planned to build a dwelling house for himself. Lot "C" as shown on Exhibit B-13 shows 47 parking spaces. He stated that the developer is prepared to pay the Town the cost of installing sidewalks at this site. He referred to a modified L.R.I.S. map filed as Exhibit B-16 on which is marked the actual use of some of the lots in the vicinity. He indicated the zoning for all the lots on Union Street is R-1.

Mr. Wallace pointed out that the subject property on the west side of Union Street is a non-conforming commercial use, being zoned R-1. He said that the nearest commercial use is the Bedford Place Mall which is situate to the rear of the lots fronting on the east side of Union Street north of the subject property. An access road from Union Street to the Bedford Place Mall is located about 650' north of the subject property.

Mr. Wallace identified Exhibit B-15 as an artist's sketch of the proposed building with the front entrance of the building facing south where the main parking area is depicted. He stated that the parking area portion of the subject property is subject to flooding (once in 100 years) according to the Flood Risk Map (Exhibit B-28).

Mr. Wallace stated that application had been made to the Town for approval of the subdivision of Mrs. Tolson's land into lots "C" and "R" with parcel "E" being a 25' access to Lot "R".

He explained the details of the proposed Development Agreement a copy of which was filed as item 21 of Exhibit B-9. Clause 10 of this proposed agreement states that the "agreement shall remain in force for no more than five (5) years from the date of signature". Clause 11 states that "Upon completion of the development, this agreement may be terminated by Town Council and the land shall thereafter be regulated in accordance with the Zoning By-law of the Town of Bedford as deemed appropriate by Town Council".

On cross-examination Mr. Wallace agreed that Exhibit

B-15 showing an artist's sketch in colour of the proposed building with the entrance facing south had been prepared after the public hearing conducted by the Town and therefore had not been seen by either the Town Council or by Mr. Zwicker, the Town's Development Officer. The colour sketch shown to the Town had the entrance facing Union Street (Exhibit B-41). Mr. Wallace stated that he had no plans for including any retail businesses in the development although Counsel for the Town pointed out that paragraph F in the Appellants' application for contract development approval states "We are applying for C-2 for an office building under contract zoning".

Under cross-examination Mr. Wallace indicated that he was not sure of the meaning of clause 11 in the proposed development agreement. This clause already referred to in this decision provided that the agreement may be terminated by the Council "upon the completion of the development".

Mr. Wallace stated he had looked at a number of other sites before choosing the subject one which he said was different from the others in that it was designated "Commercial" on the Town's Future Land-Use Map. Mr. Wallace agreed that the present use of the subject property was not a typical use for property on Union Street.

Further on cross-examination Mr. Wallace when asked what illumination would be provided for the site stated that this had not yet been worked out but would be provided to the Town at the time of the application for a development permit. He also stated that the use of signs had not been discussed with Mr. Zwicker nor with the Town Council. Finally, Mr. Wallace stated that he was not aware of the opposition to the proposed development until the day of the public hearing before Council.

On re-examination Mr. Wallace indicated that the proposed development doesn't really fit under either the C-1 or C-2 zoning categories. He considered that the proposed development did not constitute an office tower (an allowable use under C-2 zoning). His application was for the approval of an agreement that would permit the proposed development and not for any specific zoning category.

The Board arranged for an extra sitting in the evening of February 4th, 1985, to permit residents of Bedford to give evidence concerning the proposed development. It is not proposed to review in detail all of this evidence. One of these witnesses was William Richards, a meteorologist residing at 80 Union Street who read from a prepared text filed as Exhibit B-21. He supports the Town Council's decision for five reasons, namely:

> "1) The proposal is not consistent with existing zoning and use of neighbouring properties,
>
> 2) the commercial development would not be buffered from single family residential dwellings;
>
> 3) the building would set a precedent for commercial development on the lower end of Union Street;
>
> 4) commercial buildings would increment and aggravate an already contentious traffic problem and
>
> 5) the impact of increased traffic on safety of pedestrians, particularly

> school children, has not been adequately addressed."

Another person who spoke was Fred V. Hall, a teacher who has resided for the past 7 years at 93 Union Street. His main concern was for the safety of children using Union Street. He supports the Council's decision.

Donald McCarthy, a resident of 76 Union Street for 8 years presented a Petition which he had circulated on Union, Bridge, Nottingham and Meadowview Streets. This Petition signed by 171 persons and Mr. McCarthy's summary of the results of the Petition, are filed as Exhibit B-23. According to these results, of the 171 persons who signed the Petition 94.2% were opposed to the construction of a building at 26 Union Street 5.3% were in favour and .5% were undecided. Mr. McCarthy was personally opposed to the construction of a commercial building on the subject site although he did state that the proposed development might not necessarily devaluate his property.

Mrs. Shirley Towill a resident of 71 Union Street for 9 years and a resident of Bedford for 20 years strongly opposes the proposed development. Her reasons are: (1) Union Street is zoned R-1 and should stay R-1; (2) there will be an increase in traffic which is already too great; and (3) her property would be devalued.

Graeme Fraser a social worker who is a resident of 7 Nottingham Drive filed a written submission (Exhibit B-25) in opposition to the proposed development. He has been a resident of Bedford for 1½ years and while admitting that the subject property is a considerable distance from his home he considered that the proposed development would have a significant impact on his street. His concerns are stated in a written submission filed as Exhibit B-25.

Vernon Banks a two year resident of 52 Union Street, Catherine Lewis, a 4½ years resident of 85 Union Street, Alfred Smith a 1 year resident of 53 Union Street, Francene Cosman, a resident of Bedford not near the subject site, and Mary McNeil all gave evidence in support of the Council's decision. Mrs. Catherine Lewis filed as Exhibit B-26 a lengthy submission in support of the Council's decision. Among other arguments raised by Mrs. Lewis was that "there is no need for commercial development to intrude on a residential neighbourhood".

Morton Kelly, a resident of 90 Union Street for over 30 years with 9 children stated that the safety and welfare of children is his concern. He was of the opinion that the proposed development if constructed would lead to the construction of sidewalks on Union Street at least to the entrance to the Bedford Place Mall and therefore the development would improve the area.

Expert planning evidence was given by Ann Wilkie on behalf of the Appellants. She is an urban and regional planner who holds the degrees of Master of Science (Queen's University, Belfast) and Master of Arts (Edinburgh University, Scotland). She is a member of the Royal Town Planning Institute, the Canadian Institute of Planners and the International Society of City and Regional Planners. She has been a Professor in the Department of Urban and Rural Planning, Technical University of Nova Scotia since 1979 and has been Chairman of the Department since 1982. From 1976 - 1979 she was employed as Senior Planner in the Planning Department of the City of Halifax.

Ms. Wilkie stated that the purpose of a Municipal Planning Strategy (M.P.S.) is for a Council in consultation with its citizens to prepare a growth pattern for an area. She referred to page 53 of the Town's M.P.S. (Municipal Development Plan) (Exhibit B-7) under the heading "Contract Zoning" which reads as follows:

> "Within any zone, a development that would not normally be permitted by reason of inappropriate uses or is an appropriate use but outside the parameters of the actual By-law, but falls within the potentially permitted uses of the Generalized Land Use category as shown on Table III may be considered by Council through the application of contract zoning as provided for under Section 33(2) of the Planning Act. Contract Zoning will also be applied in conditions set forth elsewhere in this plan.
>
> In practice, contract zoning shall be processed in the same manner as a zoning amendment with the accompanying public hearings and shall be subject to an appeal to the Provincial Planning Appeal Board. The substantial difference is that a development agreement or contract shall be entered into between the Town and the land owner outlining the proposed uses.
>
> The nature of a contract is such that the result is a development that is outside the realm of the Zoning By-law and becomes very specific in terms of what will be permitted and how it will proceed. The approval of a contract zoning is executed by means of a legal agreement entered into between the applicant and the Town. This agreement is then registered with the land at the Registry of Deeds and remains with the land until a subsequent agreement is entered into or the agreement is discharged

by the Town."

She then pointed out that the subject site is designated "Commercial" on the Town's Generalized Future Land-Use Map, which is marked Map 7 and is found immediately following page 56 of the Town's M.P.S. In her opinion the C-1 Zone in the Town's Land-Use By-law does not fit the proposal under review, but she considered the C-2 Zone to do so because an allowable use in the C-2 Zone is for "office towers" and the Land-Use By-law does not define "office towers".

Policy Z-1 of the M.P.S. reads as follows:

> "It shall be the policy of Town Council that Map 7 shall be considered as the Generalized Future Land-Use pattern for the Town based on the policies within this M.D.P."

Ms. Wilkie referred to Policy Z-2 of the M.P.S. which reads as follows:

> "It shall be the policy of Town Council that an area immediately adjacent a given Generalized Land Use designation, may be considered for a Zoning amendment to a use permitted within the adjacent designation without requiring a plan amendment, provided, that the policies of this plan are adhered to and subject to Policy R-2."

Ms. Wilkie was of the opinion that the natural topography of the subject site minimizes the impact of the proposed building on the neighbourhood. She stated that the proposed building is not a large one. She stated that there has been a mix of residential and commercial uses in Bedford although there is a range of commercial uses which she said would be inappropriate for this area. She stated that the pedestrian system in the Town is inadequate and that "collectors and arterials in the primary area should be constructed with sidewalks at least on one side...".

With respect to transportation, Ms. Wilkie indicated that Union Street is designated as a "collector" road as shown on Map 2 of the M.P.S. "Collector roads" are defined at page 18 of the M.P.S. as "intermediate carriers of traffic, designed to collect traffic from a neighbourhood and direct it to the arterials and expressways. Access is at grade with a minimum number of access points. Rights-of-way may range from 50' to 80' and are normally two lanes undivided. Map 2 identifies the existing streets presently functioning as collectors. The majority of these (Meadowbrook, Rutledge and Union Street) were not designed or constructed to function as collector roads and require upgrading to function adequately. These improvements should be undertaken with a five year maintenance and upgrading program reviewed and approved by Council on a yearly basis". Policy T-9 of the M.P.S. states that "It shall be the intention of Town Council to develop a five year maintenance and upgrading program for the existing collector road system".

Ms. Wilkie stated that since the flood risk for the subject area is once in 100 years it is a minimal risk and should not prevent construction.

Ms. Wilkie in referring to Mr. Zwicker's report to Council dated September 5, 1985, commencing at page 32 of Exhibit B-9 stated that she agreed with Mr. Zwicker's conclusions

A, B, and C set out on page 33. These conclusions are as follows:

> "A. As provided for in the Municipal Development Plan under the Generalized Future Land Use category of Commercial, this proposal would be in conformance with same.
>
> B. The site is presently a non-conforming use containing a trucking operation and warehousing facilities and other accessory uses creating an apparent conflict with adjacent residential uses. The proposal to create a two storey office structure with accompanying parking facilities, landscaping and safe pedestrian movement along the front of the property will in the Department's opinion reduce the negative impacts that this site presently has on adjacent land uses.
>
> C. In addition to the proposed landscaping shown on the site plan, it is the opinion of the Department that additional planting should be provided on the east and west boundaries of the proposal to further assist in minimizing the impact on adjacent properties."

Ms. Wilkie in commenting on the proposed Development Agreement suggested that the Agreement should include some additional items including the use to which the building may be put, the height of the building and the allowable density of the building.

With respect to traffic Ms. Wilkie was of the opinion that if the proposed development were constructed it would attract automobiles rather than trucks which is the case at present. She preferred cars to trucks on Union Street. She felt that if there was an increase in traffic it would only be from the Bedford Highway to the subject site and would not necessarily increase the traffic on Union Street between the subject site and the rear entrance to the Mall from Union Street.

Ms. Wilkie referred to Policy Z-4 of the M.P.S. found at pages 53 and 54 of Exhibit B-7 which sets forth the criteria Council must consider. She stated that in her opinion the proposed development is in conformity with the M.P.S. (M.D.P.).

Policy Z-4 reads as follows:

> "It shall be the policy of Town Council in considering zoning amendments and contract zoning, in addition to all other criteria as set out in various policies of this plan, to have regard to the following matters:
>
> 1) That the proposal is in conformance with the intent of this Plan and with the requirements of all other Town By-laws and regulations;
>
> 2) That the proposal is compatible with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal;
>
> 3) Provisions are made for buffering, screening and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries;
>
> 4) That the proposal is not premature or inappropriate by reason of:
>
> i) the financial capability of the Town to absorb any costs relating to the development;
>
> ii) the adequacy of sewer and water services, including fire flows and water pressure, or if services are not provided, the adequacy of physical site conditions for private onsite sewer and water systems;
>
> iii) precipitating or contributing to a pollution problem in the area;
>
> iv) the adequacy of storm drainage and the effect of drainage areas on adjacent uses;
>
> v) the adequacy and proximity of school,

recreation, and any other community facilities;

vi) the adequacy of street networks in, adjacent to, or leading toward the development regarding congestion and traffic hazards;

vii) the potential for the contamination of water courses or the creation of erosion or sedimentation;

viii) impact on public access to the shorelines or the waterfront;

ix) the presence of natural, historical features, buildings or sites;

x) creating a scattered development pattern requiring extensions to trunk facilities and public services while other such facilities remain underutilized.

5. Where this plan provides for special agreements or contracts to ensure compatibility or reduce potential conflicts, such agreements may relate to, but are not limited to the following:

i) type of use, density and phasing;

ii) emissions including air, water, and noise;

iii) traffic generation, access to and egress from the site, and parking;

iv) open storage and landscaping;

v) provisions for pedestrian movement and safety;

vi) provision and development of open space, parks, and walkways;

vii) drainage both natural and subsurface and soil stability;

viii) performance bonds;

ix) the compatibility of the structure in terms of design and appearance with adjacent residential uses.

6. Suitability of the proposed site in terms of steepness of slope, soil conditions, rock outcroppings, location of watercourses, marshes, swamps, bogs,

> areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors.
>
> 7. In addition to the foregoing, all zoning amendments and contract zoning agreements shall be prepared in sufficient details to provide:
>
> > i) Council with a clear indication of the nature of the proposed development; and,
> >
> > ii) Permit staff to assess and determine the impact such development would have on the proposed site and the surrounding community."

Following the evidence of Ms. Wilkie, Ms. Deborah Cook a resident of 29 Union Street which is directly opposite the subject property and Ms. Margaret Chapman, a resident of 61 Union Street gave evidence opposing the proposed development.

Expert planning evidence was given by Barry Zwicker the Town's Director of Planning and Development, the Development Officer and also the Secretary of the Bedford Industrial Commission. Mr. Zwicker identified Exhibit B-30 which is a colour brochure about the Town of Bedford prepared by the Bedford Industrial Commission. On the back cover of B-30 is an aerial photo of a portion of Bedford on which Mr. Zwicker marked the location of the subject site. This photo provides a clear overview of Union Street and the Bedford Place Mall. Mr. Zwicker stated that the subject property is shown as "Commercial" on the Town's Future Land-Use Map and that he had recommended that a public hearing be held in connection with the application for approval of a development agreement. He indicated that one can argue that the Council's decision in refusing to approve the application was within the intent of the M.P.S. He had been involved in the drafting of the Town's M.D.P. (M.P.S.) approved by the

Minister of Municipal Affairs on September 8, 1982. He stated that prior to the adoption of the M.D.P. the subject property was designated "Residential" on the plan and he had recommended to Council that it be designated "Residential". Council, however, changed the designation to "Commercial" at the time of the adoption of the plan.

Mr. Zwicker stated that the rear entrance to the Bedford Place Mall from Union Street was in fact a publicly used private road located on land zoned R-1.

Mr. Zwicker stated that the Sunnyside area in Bedford is the principal location of the main office space in the Town. He indicated that a 20,000 square foot 4-storey office building has been recently constructed on the No. 2 Dartmouth Road and a 63,000 square foot office building is proposed for the Sunnyside area. He seemed to believe that some compromise between the desire of the developer to proceed with the construction of an office building on the subject site and the legitimate concerns of the area residents might have been worked out if Council had deferred its decision. On the other hand, although at times he seemed to oscillate on the question, he did state that Council, with the information before it at the time of its decision, made a decision which one could argue was consistent with the intent of the M.D.P. Mr. Zwicker stated that the Council had conflicting information before it from the Planning Staff on the one hand and from participating citizens on the other hand.

Mr. Zwicker identified Exhibit N-32 as being page

4 of a 1984 Department of Development survey of commercial space. It indicates that the Bedford/Sackville area had a vacancy rate of 18% in 1984.

Mr. Zwicker indicated that under the Town's M.D.P. in order for the Town Council to consider an application for a contract development for a commercial use the land would have to be designated "Commercial" on the Future Land-Use Map. He had recommended that to the Council that it should hold a public hearing on the application in question because of the fact that the subject property was designated "Commercial" on the Future Land-Use Map.

Mr. Zwicker expressed the opinion, when questioned by the Board, that the proposal in question does not conflict with the intent of the overall plan although he appeared to think that the draft development agreement could be improved upon in light of the evidence he heard at this hearing. In fact, Mr. Zwicker in a memo to Council dated October 24, 1984, had recommended several minor amendments to the draft agreement. This memo is filed as item No. 51 of Exhibit 9. This memo, according to Mr. Zwicker, was not "tabled" although it was available to the Council on October 24, 1984. He was not certain whether Council actually was in possession of this memo or not on October 24, 1984.

Mr. Zwicker, although of the opinion that the proposed development meets the intent of the Town's M.D.P., was personally not totally in favour of the development. He considered that the subject area was basically residential although close at hand to a major shopping mall and he thought there were other areas of the Town more suitable for the construction of office buildings where there would not be an intrusion into R-1 area. He had no problem with the continuation of the existing non conforming commercial use of the subject site.

Evidence was given by Joan Pryde the Deputy Clerk of the Town. She referred to the Minutes of the public meeting where the Town's draft M.D.P. was under consideration. She explained that Elsie Tolson, one of the Appellants appeared at that meeting and requested that Council designate the subject property owned by her as commercial on the future Land-Use map. Council did so.

Paul R. Paynter, the Director of Engineering and works gave evidence concerning traffic and streets in the Town. He indicated that under the Town's M.D.P. the Town's policy was that sidewalks should be constructed on at least one side of all collector roads in the "primary area" of the Town. The subject property lies within the "primary area" which is defined in the M.D.P. as the "area which is serviceable". Mr. Paynter pointed out that Union Street joins the Bedford Highway at an angle and there are no traffic lights at this intersection which he stated is not an ideal situation. He indicated he only did a general traffic study impact respecting the proposed development because he did not know the exact type of tenants who would occupy the proposed building. He indicated that the residents of Union Street would have a legitimate concern about the impact of any increase in traffic on Union

Street. However, he stated that his department was not equipped to conduct a detailed traffic study.

On cross-examination Mr. Paynter agreed that none of the roads in Bedford designated "collector" would meet the Canadian standards for collector roads. He also stated that at the present time there are no collector roads in Bedford with sidewalks and that to date the Town had not implemented its sidewalk policy. Mr. Paynter was the co-author with Mr. Zwicker of a report to Council dated October 11, 1984, and this report in referring to the proposed development stated that:

> "...it is the staffs' opinion that if there is an increase at all [in traffic] it will have no affect on the relative volume of traffic presently utilizing Union Street".

Ronald G. Singer, an accountant employed by the Town testified that the total residential assessment of properties on Union Street, Bridge Street, Meadowview and Nottingham is approximately 8.7 million dollars.

John M. Towner, of J.M. Towner Construction Co. Ltd., gave evidence concerning the Bedford Main Street Program and made reference to a report prepared in June, 1981 by Lydon Lynch Associates Ltd., concerning this program. He stated that the Town has entered into the Provincial Main Street Program which is indicated on page 24 of the Town's M.D.P. He stated that the geographic limits of this program are shown on Map 3 of the M.D.P. and a portion of Union Street is included.

Expert planning evidence on behalf of the Town was given by Sydney J. Langmaid a professional planner and appraiser with over 20 years experience in real estate, urban economics, planning and development. He is a member of the Canadian Institute of Planners and the Appraisal Institute of Canada. Mr. Langmaid stated he was familiar with the subject property and had read the Town's M.D.P. and Zoning By-law and had reviewed the material in Exhibit B-9 (the material in the Town's file). He is of the opinion that there is an over supply of office space in Bedford. In his view the extra traffic on Union Street which would be created by the proposed development would be too great for the street and would have a significant impact on the area in question. He estimated that the development would generate between 500 - 1000 automobile trips per day which he considered significant in relation to his understanding of the present daily traffic of approximately 2000 trips per day. He considered the proposed development to be "the worst sort of ad hoc planning". He said Union Street is exclusively residential and predominantly single family dwellings.

Mr. Langmaid referred to an aerial photograph of a portion of Bedford (Exhibit B-43) which shows Union Street as a residentially developed area. Mr. Langmaid was of the opinion that a decision to allow the proposed development would have a domino effect leading to other inevitable pressures for commercial development to continue and he sees no significant reason to allow this to happen.

Mr. Langmaid reviewed the proposed development in the light of the provisions of Policy Z-4 in the M.D.P. which are fully set out at pages 15, 16 and 17 of this decision.

Mr. Langmaid is of the opinion that the proposed development does not comply with clauses 1, 2, 4, 5 and 6 of Policy Z-4 of the Town's M.D.P. He was also of the opinion that the Council's decision was "entirely consistent with the Plan."

Ann Wilkie, the planner, was recalled by the Appellants to give rebuttal evidence. She stated that in her opinion Mr. Landmaid's estimate of traffic which would be generated by the proposed development was high. With respect to the Future Land-Use Map in the M.D.P. Ms. Wilkie said you cannot ignore it as it is an integral part of the M.D.P. and is "also specifically referenced in the implementation policies". She pointed out that there has been a continuity of commercial use of the subject property since 1939 and this commercial use predates most of the homes on Union Street. Furthermore, she was of the opinion that because the Generalized Future Land-Use Map designated the subject property "Commercial" that this gave the applicants the right to apply to the Town for approval of a contract development which would allow a specific commercial use and the application should then be judged as to whether or not the proposed development meets the intent of the M.D.P. She is of the opinion that the proposed development does meet the intent of the M.D.P.

Ms. Wilkie was asked by the Board to give her opinion as to what type of commercial use for the subject property would not meet the intent of the M.D.P. She indicated some commercial uses such as restaurants and stores which generate a high degree of traffic would not be acceptable. She considered the proposed development was compatible with the existing residential uses on Union Street. In answer to a hypothetical question assuming there was no M.D.P. in effect in the Town would she favour rezoning the subject property to a commercial zone with C-2 or C-3 she answered "No". She distinguished this hypothetical case from the case at hand on the basis that this is a specific commercial proposal to be considered by the terms of the M.D.P. which because of the Generalized Land-Use designation of the subject property as commercial allows for this process. Ms. Wilkie was unable to state what the limits on size should be in order to meet the intent of the M.D.P. She did say that a proposed development of 25,000 square feet would be a "significant" increase in size.

Following the hearing of the evidence the Board requested Counsel to file written briefs which were subsequently filed by February 21, 1985.

The Appellants' brief after quoting from the "Objective" set out in the M.D.P. under the Commercial Section 5 of the Plan, then states:

> "that the future Generalized Land-Use Map #7 is a pictorial presentation of the policies and objectives of the Municipal Planning Strategy. The designation of the site in question for commercial uses is a pictorial statement that the site in question fits within the general objectives of the commercial section of the Municipal Development Strategy of the Town of Bedford. What the Board must now consider is not all commercial uses but the particular commercial use requested for a portion of 26 Union

> Street, being Lot "C". The Appellant(s) states that the designation of the site in question as future commercial doesn't mean that all commercial uses are acceptable or compatible but that it does recognize the fact that there must be some commercial uses which are compatible."

The objective in the Commercial section 5 of the Plan reads at page 23 as follows:

> "It is the objective of Town Council to insure the development of business and commercial uses which are consistent with the preservation, creation and maintenance of a well balanced community and which are appropriately located in relation to neighbourhoods, the town, or the region."

The Appellants' brief states at page 6 that "our site is not designated for future residential development, therefore, it is our submission that the policies set forth under Section 3 of the Municipal Development Strategy dealing with residential density and mix are not proper considerations in this appeal." The Board is unable to agree with this submission as it is the Board's opinion that it must give proper consideration to all sections of the M.D.P. in order to ascertain whether the Council's decision in refusing to approve the proposed agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy in accordance with s.s.(4) of Section 72 of the Planning Act.

The Appellants' brief points out that the Town's M.D.P. at page 20 states that the pedestrian system within Bedford is inadequate and that "in new developments, the tentative plans should identify internal walkway systems linking the major elements of the development internally as well as with pedestrian systems on its boundaries". The Appellants say they are complying with the direction given on page 20 of the M.D.P. that "as a general guideline, collectors and arterials in the Primary area should be constructed with sidewalks at least on one side with safe pedestrian crosswalks where necessary."

The Appellants in their brief submit that their proposed development if approved "would act as an impetus to the construction of at least a sidewalk leading from the back access road to the mall past the site in question to the intersection of Union Street with the Bedford Highway".

The Appellants submit that the proposed development complies with the contract zoning provisions of the M.D.P.

The Appellants submit that in considering contract zoning the Council pursuant to Policy Z-4 of the M.D.P. must have regard to certain matters which the Appellants submit does not mean that they must comply in every respect with every one of these matters but the Council must have regard to the consequences of these and the Council must consider those matters set forth in Policy Z-4 clauses 1 to 4 inclusive.

The Appellants further point out that special contract zone agreements may "relate" to, but are not limited to certain matters set out in clause 5 of Policy Z-4. The Appellants submit that there is thus no compulsion to relate to the matters set out in clause 5.

Finally, the Appellants submit that:

> "In summary, both Barry Zwicker and Ann Wilkie expressed the opinion that the proposed development is consistent with the policies and objectives of the Municipal Planning Strategy and is in

> conformance with the generalized land use for the lot in question and the commercial use proposed is one with a properly drafted development agreement could meet the concerns of the majority of, if not all, the residents of the area. That the Development Agreement is site specific, having no similarity with the phrase 'spot rezoning' and that the proposed commercial development was compatible with the Municipal Planning Strategy and that its timing was not premature and was compatible with the adjoining neighbourhood. Therefore, we submit that, in conclusion, the decision not to enter into the Development Agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy of the Town and we request that the Board refer the matter back to Council to finalize the terms of a Development Agreement for the site in question with such terms as the Municipal Board may require."

It is clear from the large number of persons who gave evidence in opposition to the proposed development that the residents of the Union Street area of Bedford are strongly opposed to the construction of an office building on the subject site. Throughout the hearing a relatively large number of persons were in attendance.

It is clear from the provisions of subsection (4) of Section 2 of the Planning Act that the Board is not to interfere with the Council's decision "unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy".

In assessing whether or not the proposed two-storey office building with outside parking facilities for 47 vehicles comes within the intent of the Town's Municipal Development Plan (M.P.S.), the Board must of necessity consider the proposed development in relation to the Municipal Development Plan (M.P.S.)

as a whole. As has already been pointed out in the Board's review of the evidence given at the hearing, the purposes of the Municipal Development Plan "are to provide guidance to the decisions of the Town Council and to inform the citizens of the Town concerning the process of regulating the physical, social and economic development and the provision of public services and facilities." "The overall objective of the plan is the enhancement of the physical, social and economic well being of the residents of Bedford through the preservation, creation and maintenance of an interesting and liveable town, developed in an orderly fashion and at a scale and density which preserves and enhances the quality of life" (M.D.P. page 1). It is clear from the evidence that the subject property although used for commercial purposes since 1939 is zoned residential single family (R-1). Most of the properties on Union Street are in fact occupied by single family dwelling residences. Union Street therefore is predominantly residential with the exception of the subject property which at the present time is used by Robinson Brothers Limited, a firm engaged in the trucking business. The present commercial use of the property, although allowable under the Planning Act as a non-conforming use would not in the opinion of the Board be considered a use compatible with the residential uses and residential zoning in effect on Union Street.

Although Mr. A.E. Wallace, President of Wallace, MacDonald & Lively Limited, expressed the desire on behalf of his surveying company to construct an office building in

Bedford which would allow for his firm to expand its facilities and operations and provide for extra accommodation which would be rented to other persons, there was no indication of the demand for office space in Bedford exceeding the supply. In fact, the evidence indicates that in the year 1984, there was an 18% vacancy rate for office space in the Bedford/Sackville area.

Mr. Wallace in his evidence indicated that he had endeavoured to find suitable land for the construction of the proposed building in Bedford and he had ascertained that the subject site was the most satisfactory one from the point of view of himself and his Company. It is certainly understandable why he chose this particular site which is presently used for commercial purposes and which is shown on the Town's Generalized Future Land-Use Map as "Commercial". By virtue of this designation on the Generalized Future Land-Use Map of the Town the Appellants properly were able to make application to the Town for the approval of a development agreement which would enable the proposed building to be constructed if approved by Council. Map 7 forming part of the Town's M.D.P. (M.P.S.) is the Town's Generalized Future Land-Use Map and the subject site is designated in red signifying a generalized future land use of "Commercial" for this site.

Section 5 of the Town's M.D.P. is the implementation section and it contains policy Z-1 which states:

> "It shall be the policy of Town Council that map 7 shall be considered as the Generalized Future Land-Use pattern for the Town based on the policies within this

M.D.P.".

It is relevant to note that Policy Z-2 of the implementation section states:

> "It shall be the policy of Town Council that an area immediately adjacent a given generalized land-use designation, may be considered for a zoning amendment to a use permitted within the adjacent designation without requiring a plan amendment, provided, that the policies of this plan are adhered to and subject to Policy R-2".

Policy R-2 is a policy which appears in the residential section 3 of the M.D.P. and it reads as follows:

> "It shall be the intention of Town Council, upon reviewing and/or approving a plan amendment to amend the residential development boundary to consider the following:
>
> (1) servicing requirements and capabilities;
>
> (2) does the population or population projection warrant an amendment at that time?
>
> (3) will the proposed development have an adverse affect on the utilization of existing infrastructure?
>
> (4) will the development have a detrimental impact on the natural environment of the town?"

Section 10 of the M.D.P. sets forth the plan's provisions with respect to contract zoning and these provisions which appear at page 53 of the M.D.P. have already been quoted in this decision. It is clear that in considering a zoning amendment or an application for contract zoning the Town Council is obliged to consider or have regard to certain matters set out in Policy Z-4 of the Municipal Development Plan in addition to "all other criteria as set out in various policies of this plan". Clause 2 of Policy Z-4 reads as follows:

> "That the proposal is compatible with adjacent uses and the existing development form in the area in terms of the use, bulk and scale of the proposal".

It is the opinion of the Board that the proposed development of the 15,000 square foot, two-storey office building is not compatible with the adjacent residential uses primarily single family dwelling uses in terms of the use, bulk and scale of the proposal. Also while the bulk of the building is not huge in terms of comparing it with a large office tower or office building, it is nevertheless a much bulkier building than any of the buildings presently located on Union Street and although a very serious effort has been made to blend in the proposed building with the topography of the land, it nevertheless is a building which in the opinion of the Board would be out of scale with the residential buildings in the vicinity of the subject site.

It is the opinion of the Board that because the subject property is shown as "Commercial" on the Town's Generalized Future Land-Use Map this does not in itself oblige the Council of the Town on an application for approval of a development agreement which would allow some type of commercial use to take place to necessarily approve that application. It is the opinion of the Board that under the provisions of the M.D.P. the Council may give consideration to the application for contract zoning but is not obliged to approve such an application except in a case where approval of the application would reasonably come within the intent of the M.D.P. There may well be individual cases where a proposed development could come before the Council for approval through the contract zoning process which would involve a commercial use compatible with the existing uses to some reasonable degree and therefore be reasonably within the intent of the M.D.P. and should receive the approval of the Council or of the Board if the application were refused by the Council and an appeal to the Board was taken. Presumably in such a situation the proposed development would not be a highly intensified commercial use of the subject property and would have provision for buffering, screening and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries further to the intent of clause 3 of Policy Z-4 of the M.D.P.

It is the Board's opinion that s.s.(4) of Section 72 of the Planning Act creates a burden or onus on the Appellants to demonstrate to the Board that the Council's decision not to enter into the proposed agreement "cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy". S.S. (4) of Section 72 directs the Board not to interfere with the Council's decision unless the Board determines that the decision cannot reasonably be said to be consistent with the intent of the M.P.S.

In the case at hand the Board is satisfied, based on the evidence adduced at the hearing, on examination of the provisions of the Town's M.D.P. (M.P.S.), on perusal of the terms of the proposed agreement, the submissions of counsel and from the Board's view of the subject site and the lands in the vicinity of the subject site that the Appellants have not discharged the onus or burden placed on them by virtue of the provisions of s.s.(4) of Section 72 of the Planning Act.

There is no doubt that the Council of the Town in adopting a municipal development plan (M.P.S.) subsequently approved by the Minister of Municipal Affairs in which certain lands including the subject property were designated "commercial" on the Generalized Future Land-Use Map, intended that the subject property (Lot "C") as well as the balance of the land owned by the Appellant, Elsie Tolson, comprising the property collectively known as No. 26 Union Street, Bedford, could be considered by the Council sometime in the future under the contract zoning provisions of the M.D.P. and the Planning Act. The effect of the M.D.P. designating the subject property "Commercial" on the Generalized Land-Use Map is not in the opinion of the Board a guarantee that any of the potentially permitted commercial uses will be approved through the contract zoning process but only that the Council may consider these uses.

In the case at hand the Board heard conflicting testimony from two of the expert witnesses, Ann Wilkie on behalf of the Appellants and Sydney Langmaid on behalf of the Town. Both of these witnesses are highly qualified planning experts. Ms. Wilkie is of the opinion that the proposed development meets the intent of the M.D.P. because the subject property has been earmarked for a commercial use on the Generalized Future Land-Use Map and the proposed office building is a form of commercial development which she considers to be compatible with the residential uses now in effect on Union Street and meets the intent of the M.D.P.

Mr. Langmaid on the other hand, totally rejects the proposed development as being incompatible and inappropriate for Union Street because of the predominance of the residential uses on that street. He also expressed concern about the domino effect the approval of this development might have on other lands on Union Street.

Mr. Zwicker the Town's Development Officer and Director of Planning is also a highly qualified planning expert. While he apparently would not recommend approval of the proposed development in the form in which it was presented to the Council nevertheless was of the opinion that the proposal was within the intent of the M.D.P. He seemed to believe that had Council deferred its decision and given the application some further study that a development proposal satisfactory to the developer and to the residents of Union Street could have been worked out. Based on the Appellants' expressed intent to have a commercial development consisting of 15,000 square feet of office space with outside parking facilities for 47 vehicles and the strong opinions of those persons opposing the development as being an unwanted and unnecessary intrusion into their neighbourhood the Board doubts if any satisfactory compromise could have been worked out. This is not to say, however, that some specific form of commercial use is not possible for this site which would be reasonably compatible with the adjacent residential uses and come within the intent of the M.D.P. The Board agrees with that portion of the Appellants submission which states "that the designation of the site in question as future commercial doesn't mean that all commercial uses are acceptable or compatible but it does recognize the fact that there must be some commercial uses which are compatible".

In the result the Board is satisfied that the Appellants have not discharged the onus or burden on them of demonstrating to the Board that the Council's decision cannot reasonably be said to be consistent with the intent of the Town's M.D.P. (M.P.S.). The Board therefore is not prepared to interfere with the Council's decision.

The appeal is therefore dismissed and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of May, A.D., 1985.

RH Blois

R.H. BLOIS
CHAIRMAN, NOVA SCOTIA
MUNICIPAL BOARD.

City of Sydney v. County of Cape Breton

PLANNING--ZONING AMENDMENT--WATER SUPPLY (WS) TO A-2 TO PERMIT SINGLE FAMILY DWELLING--"EXTRAORDINARY AND COMPELLING CIRCUMSTANCES"--PROTECTION OF THE BEST INTERESTS OF THE MUNICIPALITY--ENVIRONMENTAL PROTECTION ACT, SS.2(g), 3, 8(1), 23--HEALTH ACT, S.11--PLANNING ACT, SS.63(1),(6),(7)--SYDNEY CITY CHARTER, S.290A(1),(5)--WATER ACT, SS. 2, 8(1)

This is an appeal by the Council of the City of Sydney against a decision of the Municipality of the County of Cape Breton which rezoned land belonging to C.P. on the Sydney-Louisbourg Highway from Water Supply (WS) Zone to Agriculture (A-2) Zone. There is no Municipal Planning Strategy in effect in the subject area of the County. The property is approx. 67 acres, lies south and west of Bray Lake, which is one of the lakes forming part of the water supply system of the City of Sydney, and is within the boundary delineating the watershed of the water supply system of the City. The purpose of the rezoning is to permit construction of a single family dwelling.

HELD: The appeal is allowed. The Board reverses the decision of Council.

Subsection 7(b) of s.63 of the Planning Act relating to "extraordinary and compelling circumstances" has no relevance here since it only applies in the situation where the appeal is by an "applicant." Here the Appellant is not the applicant. The applicant is C.P. The question the Board must determine under s.63(6) of the Planning Act is whether the decision of the County of Cape Breton was inconsistent with or unnecessary for the protection of the best interests of the County. This determination must be made despite the provisions of s.290A(1) of the Sydney City Charter dealing with the erection or construction of buildings or structures on lands forming part of the watershed of the City's water supply system. The Board is obliged to follow s.63(6), which provides a clear direction to the Board. There are some water users of the City's water supply system resident in the County of Cape Breton and any decision of the County which might create pollution of the City's water supply system would be inconsistent with or unnecessary for the protection of the best interests of the Municipality of the County of Cape Breton. The Board is concerned that in approving A-2 zoning for the subject property Council has opened the door to all uses permitted in an A-2 Zone, which include agricultural uses, recreational uses, kennels, tourist cabins and day nurseries. Some of these uses create the possibility of causing pollution to the City's water supply. The range of permitted uses in the A-2 zone is simply too broad to be an appropriate zone for lands on a watershed forming part of the water supply system for thousands of persons. The City has met the onus on it. The land owner, C.P., is not without recourse and may invoke the provisions of s. 290A of the City Charter to require the City to purchase or expropriate his land.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and

IN THE MATTER OF: An Appeal by the Council of the City of Sydney from a decision of the Council of the Municipality of the County of Cape Breton made on December 18, 1984, amending the Municipality's Land-Use By-law by rezoning land on the Sydney-Louisbourg Highway from Water Supply (WS) Zone to Agricultural (A-2) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: M.G. WHALLEY, Q.C., for the Council of the City of Sydney;

DAVID N. MUISE, LL.B., on behalf of the Council of the Municipality of the County of Cape Breton;

MICHAEL J.D. MACDONALD, LL.B., on behalf of landowner Charles Peters.

DECISION

This is an appeal by the Council of the City of Sydney against the Decision of the Council of the Municipality of the County of Cape Breton made on December 18, 1984, which decision amended the Municipality's Land-Use By-law by rezoning land on the Sydney-Louisbourg Highway from Water Supply (WS) Zone to Agricultural (A-2) Zone. The Appellant's Notice of Appeal is dated January 2, 1985 and was signed by the Solicitor for the Council of the City of Sydney. This Notice of Appeal was received by the Board on January 7, 1985.

The hearing of the appeal was held in the Council Chambers of the City of Sydney on March 5th and 6th, 1985. At the commencement of the hearing, Counsel for all parties were in agreement that the appeal was regularly and properly before the Board and that the Board had jurisdiction to hear the appeal on the merits.

Counsel for the City of Sydney tendered an Affidavit of Service (Exhibit S-2) in proof of the fact that Notices were sent to certain persons named by the Board. It was also established that the Notice of Hearing prepared by the Board was advertised in the Cape Breton Post by three advertisements which appeared on February 12th, 19th and 26th, 1985.

The subject property lies within the boundaries of District No. 17 of the Municipality of the County of Cape Breton. There is at the present time no Municipal Planning Strategy in effect for District No. 17 and it appears that the only Municipal Planning Strategy in effect in the Municipality of the County of Cape Breton at the time of the hearing was for District No. 10.

Evidence on behalf of the Appellant was given by Alexander J. MacDonald, the Director of Water Resources for the City of Sydney; Malcolm Gillis, a Planner employed by the Cape Breton District Planning Commission and by Douglas Foster, the Director of Planning for the Cape Breton District Planning Commission.

Evidence on behalf of the landowner Charles Peters, was given by J.W. Bailey, an employee of the Nova Scotia Department of Health; by Charles Peters, the owner of the subject land; by Patrick Ormond, a resident and owner of property on the Mira Road in close proximity to the property owned by Mr. Peters and by Anna Steele, Certified Engineering Technician employed by the Nova Scotia Department of Environment.

The subject property is a large tract of land situate on the northeast side of the Sydney-Louisbourg Highway having a frontage on the highway of 670 feet and an area of approximately 67 acres. The property lies south and west of Bray Lake, which is one of the lakes forming part of the water system of the City of Sydney. Most of the subject property owned by Mr. Peters lies within the watershed of the water supply of the City of Sydney between the Sydney-Louisbourg Highway and the boundary delineating the watershed of the water supply system of the City of Sydney. A portion of Mr. Peters' lands to the rear lies outside of the watershed boundary and the non-watershed property does not have any frontage on a road or public street and is quite remote from the Sydney-Louisbourg Highway.

The purpose of the owner, Mr. Peters, in making his application to have his property rezoned from Water Supply Area (WS) Zone to Agricultural (A-2) Zone is to permit the construction of a single family dwelling. The Notice of Appeal filed on behalf of the Council of the City of Sydney states the following grounds for the appeal namely:

> "That the lands lie within the watershed of the source of the water system of the

> City of Sydney and construction thereon is prohibited by Section 290(A) of the City Charter of the City of Sydney."

Section 290A(1) of the Charter of the City of Sydney, S.N.S. 1903, c. 174 as amended, reads as follows:

> "No person other than the City of Sydney shall upon any land forming part of the watershed of any of the lakes, rivers or streams forming part of the source of supply water system of the City of Sydney erect or construct or place or cause or permit to be erected, constructed or placed any building or structure.
>
> Provided that the owner of any land in the said area as delineated on the plan filed by the City of Sydney in the Registry of Deeds at Sydney in the County of Cape Breton on the 8th day of September, A.D., 1956 may at any time offer to sell his said land to the City; unless the City makes an agreement with the said owner to purchase the said land, within sixty days from the date on which the offer is made, the City shall immediately after the expiration of said sixty days, proceed to expropriate the said land; the provisions of Sections 296 to 304 of this Act shall apply to said expropriation."

It is to be noted that under s.s. (5) of Section 290A there is provision for the Council of the City of Sydney authorizing the construction of a building on the watershed. S.S.(5) is set forth herein as part of a staff planning report prepared by Malcolm Gillis a planner employed by the Cape Breton Metro Planning Commission.

The appeal was filed by the City of Sydney pursuant to the provisions of Subsection 1(d) of Section 63 of the Planning Act S.N.S. 1983, c. 9, which reads as follows:

> "The amendment, revision or refusal by a Council to amend or revise the land-use by-law may be appealed by:

(a).............
(b).............
(c).............
(d) The Council of an adjoining
Municipality."

The City of Sydney adjoins lands of the Municipality of the County of Cape Breton at a point approximately 9,400' north west along the Sydney-Louisbourg Highway from the subject property.

The first witness called by the City of Sydney was Alexander J. MacDonald, the Director of Water Resources for the City for the past ten years. Mr. MacDonald has been a professional civil engineer since 1952. He identified a plan of the watershed of the City of Sydney filed as Exhibit S-5 in which the various LRIS property numbers are marked. The solid line on this plan delineates the area zoned watershed and the dotted line on the plan delineates the natural drainage line of the watershed. The subject property owned by Mr. Peters is marked in red on the plan and Mr. MacDonald indicated that he had personally inspected the subject property, through which a man-made ditch runs, which he stated was designed to take water from Bray Lake to the City's reservoir. He also indicated that there was a brook on the subject property known as Sullivan's Brook. He indicated that the City regularly takes water samples from the brook and the ditch and that there is usually a flow of water through the brook. He indicated that the purpose of the ditch was to take water from Bray Lake to Sullivan's Brook which in turn runs into the City's reservoir. He stated that properties on two sides of Mr. Peters' land are presently owned by the City of Sydney and Mr. Peters' property is bounded on the northeast or rear side by property owned by Patrick Ormond. He stated there are no buildings on the subject property and to his knowledge there never were any. On cross-examination by Counsel for the Municipality of the County of Cape Breton, Mr. MacDonald indicated that employees of the Department of Health were responsible for taking samples of the water from Sullivan's Brook.

On cross-examination by Counsel for Mr. Peters, Mr. MacDonald admitted that there was a CBC station and tower directly across from the Peters' property on the southwest side of the Louisbourg Highway. This station would thus appear to be located on lands zoned by the Municipality of Cape Breton as Water Supply Area (WS) Zone.

Under the provisions of the Municipality's Zoning By-law (Land-Use By-law - Exhibit S-3) the permitted uses in the (WS) Zone are:

> "Forestry uses, but not related processing plants, conservation and water supply related uses. In a (WS) Zone no development permit shall be issued unless the lot has a minimum area of 10 acres."

According to Mr. Alexander J. MacDonald, the man-made ditch in question was constructed in the 1930's and the water in this ditch is tested every 2 or 3 weeks during times when there is water running in the ditch.

Malcolm Gillis, a qualified planner employed by the Cape Breton District Planning Commission since 1979 was called by the Appellant. Mr. Gillis is familiar with the subject property and is the author of a planning report dated November 5, 1984, signed by Mr. Gillis and by Douglas Foster the Director of Planning for the Cape Breton Metro Planning Commission and given to the Municipality of the County of Cape Breton. A copy of this report appears as item No. 3 of Exhibit S-4.

The planning report prepared by Mr. Gillis states that the Peters property is within the watershed of the City of Sydney's source of water. The following comments appear in the staff report:

> "This water supply is utilized by approximately 30,000 people from within the City of Sydney and the Municipality of the County of Cape Breton. The primary concern of the staff of the Metro Planning Commission must be the protection of the watershed to ensure the preservation of the quality of the water. Any land use on watershed lands has the potential to degrade the quality of surface water.
>
> If zoning is to be used by a municipality to ensure the protection of a water supply it should be as restrictive as possible. Granting permission to one landowner is a precedent setting decision. Every other landowner in the watershed should expect the same rights. The question is not only whether Mr. Peter's proposal could result in degredation of the quality of the water but whether lessening the restrictions encourages a pattern of development (based on the potential of developing all the remaining lands held in private ownership to the same extent that Mr. Peters is permitted) which would eventually endanger the quality of the water.
>
> Although, if development restrictions were removed, only a relatively small percentage

of the watershed could be developed (only 18% of the land is privately owned) the water quality should not be jeopardized just because the development potential is lesser than in most other watersheds in the Province where a much greater percentage of the land is privately owned. Just because the danger is less severe, ensuring the preservation of the quality of drinking water for 30,000 people should not be risked if the opportunity exists and the mechanism is already in place to have a watershed where no development exists.

While it is true that, if there are no restrictions, the potential to pollute a source of water is lesser when the percentage of land held in private ownership is less, this is only one factor. There are many other important concerns such as the type and density of development permitted, the proximity of the development to any existing water course within the watershed and the soil conditions. All these considerations must be evaluated before it can be determined whether the water quality would be jeopardized. For these reasons the Nova Scotia Deputy Ministers' Committee on Land Use Policy Regarding Watershed Management & Protection recommended in a draft report, the closest assurance to a guarantee is to prohibit development completely within a water supply area. The staff of the Planning Commission believes this to be the soundest advice.

Local officials from both the Provincial Dept. of Health and Environment, however, have stated permitting a limited amount of development in this watershed on very large lots with excellent percolation, a safe distance from any lake, or watercourse which eventually leads into a lake, would probably not jeopardize the quality of the water supply.

There is still one overriding factor that staff feels obliged to inform Council of. Section 290A. (1) of the Charter of the City of Sydney, which was proclaimed by the Nova Scotia Legislature, states:

> '290A.(1) - No person other than the City of Sydney Shall upon any land forming part of the watershed of any of the lakes,

> rivers or streams forming part of the source of supply or water system of the City of Sydney erect or construct or place or cause or permit to be erected, constructed or placed any building or structure.'

The Charter also states that a person may apply to City Council to waive this restriction. Section 290A.(5) states:

> '(5) If the owner of land within the watershed so requests in writing, and if the City Medical Officer certifies that it can be done without danger of pollution of the water in the water system of the City, the Council may by resolution,
>
> > a) authorize the erecting, constructing, or placing of a building upon the said land; or
> >
> > b) declare that the land does not form part of the watershed for the purposes of sub-section (1); A copy of the resolution certified by the City Clerk under the seal of the City, may, without the proof of execution required by the Registry Act, be registered in the office of the Registrar of Deeds, at Sydney.'

Mr. Peters did make a formal application to the City of Sydney to permit him to construct a residence on this property and his application was denied. Included with this report is a copy of a letter from Mr. Mike Whalley, City Solicitor, stating the City of Sydney's position regarding Mr. Peter's application and development proposals in general within the watershed. The staff of the Metro Planning Commission is convinced the City of Sydney has the right to prohibit development on private lands within this watershed and is prepared to utilize this right.

Although this is not a zoning matter, staff believes that if the City of Sydney has the right to prohibit development in this watershed the zoning should reflect this. If the zoning permits development, then the Development Officer is required to issue a permit. An individual receiving a permit in a situation like this would be falsely assuming he or she has the right to

> erect a building only to have the City threaten court action, if construction starts. It could be looked upon as irresponsible on behalf of the County to issue development permits within an area where the City of Sydney has the right to prohibit development and is prepared to utilize that right. If development is prohibited in this watershed a person should be informed at the building permit application stage and not after a permit has been issued and construction commenced.
>
> Recommentation: The staff of the Metro Planning Commission recommends rejection of this application."

On cross-examination Mr. Gillis admited that some local Department of Health and Environment Officials were of the opinion that some limited development within the watershed on large lots with excellent percolation could take place without affecting the quality of the water supply of the City of Sydney. He also admitted that there were many dwellings located on the Sydney River water supply watershed. On re-examination Mr. Gillis considered that any development on the Sydney watershed lands would be a precedent encouraging other applications for development.

Douglas Foster, the Director of Planning for the Cape Breton Planning Commission was called by counsel for the City of Sydney. Mr. Foster is a qualified planner and co-signed the planning report prepared by Mr. Gillis. He referred to a report to the Sydney Water Commission dated December, 1983, by C.A. Campbell Consultants Limited, an engineering consulting firm. A copy of this report was filed as Exhibit S-8. This report relates to the feasibility of a regional water supply system for the greater Sydney area. It describes the existing water sources and systems in the Sydney Metropolitan area and reviews these systems in terms of their ability to meet present and projected demands and, where appropriate, it identifies and discusses major inadequacies.

This study in referring to the City's own watershed states that this watershed has an area of seven square miles, of which 12% is lake surface area. The City's reservoir was created by damming Sullivan's Brook and water flows by gravity from the reservoir to the City's distribution system. The study states that Bray Lake has been added to the reservoir's catchment area by the construction of a ditched diversion to Sullivan's Brook. The study states that in 1958 the City of Sydney purchased much of the watershed lands and there remains at present on the watershed only 19 dwellings located for the most part "in the vicinity of the reservoir and Sullivan's Brook. These dwellings utilize wastewater disposal systems."

Mr. Foster testified that in his opinion the Water Act, R.S.N.S. 1967, c. 335 does not provide the proper mechanism for protecting watersheds used for public water supply purposes. He expressed the opinion that as a planner there should be no development permitted on watershed lands.

Mr. Foster referred to a Summary Report prepared by the Nova Scotia Deputy Ministers' Committee on Land-Use Policy respecting the management of water supply watersheds and filed as Exhibit S-7. This report is revised to February 1980 and although it has no official status and its recommendations have not been implemented it is nevertheless a serious report on the subject of the management and protection of water supply watersheds. This report contains a policy statement on the subject of protecting water quality. This statement indicates among other things that public ownership of municipal watershed lands is the most effective means by which use of watershed lands may be controlled and water quality protected. The policy statement also indicates that the Province "will continue to support the implementation of land-use controls in municipal watersheds by the local government responsible for the water works". The policy statement further indicates that the "Province will continue to support efforts by local water utilities to protect, manage and effectively administer their municipal watersheds by reviewing and revising existing Provincial statutes so that protection of the water resource may more readily be assured."

Mr. Foster stated that there is no municipal planning strategy in effect for Municipal District No. 17 in which the subject land is situate. He indicated that the permitted uses in the Agricultural 2(A2) Zone include all uses permitted in the A-1 Zone plus mobile homes. The permitted uses in the A-1 Zone are:

> "single family dwellings, agricultural uses, forestry uses, recreational uses, cemetaries, churches and subsidiary uses, kennels, schools, tourist cabins and day nurseries."

The minimum lot size in both the A-1 and A-2 Zones is 40,000 square feet. These uses are in sharp contrast to the permitted uses in the Water Supply Area (WS) Zone which are:

> "Forestry uses, but not related processing plants, conservation and water supply related uses".

Mr. Foster testified that he could not give any reason why the decision of the Council under appeal was in the best interest of the Municipality of the County of Cape Breton. He also stated that in his opinion the decision to rezone the subject property was unnecessary for the protection of the interests of the Municipality of the County of Cape Breton.

J.W. Bailey, the Regional Public Health Engineer with the Cape Breton Health Unit of the Department of Health was the next witness called by the Appellant. He had written a letter dated November 15, 1984, to Malcolm Gillis the planner filed as Exhibit S-6. His letter was in reference to the application by Mr. Charles Peters to have the Municipality's Land-Use By-law amended to permit the construction of a single family residence. The last three paragraphs of his letter are particularly relevant to this appeal and read as follows:

> "The Department recognizes that there may be a low risk of a potential health impact due to the construction of a single dwelling on the watershed. However, allowing this development may be setting a precedent for further development and further increasing health risks and ramification. This represents the 'thin edge of the wedge' of possible future development.

> The City of Sydney has retained ownership of a major portion of its watershed for an extended period of time and has exercised developmental controls within the watershed during that period. This included the exclusion of new development and has for the most part been accepted by the community as part of the requirement for maintaining acceptable water quality. Hence, there is no precedent for the commencement of any new development on this watershed.
>
> Therefore, in order to maintain as high a level of water quality as possible by retaining the undeveloped nature of the watershed, development should be excluded from this watershed."

On cross-examination Mr. Bailey agreed that his opinion respecting the Peters property was academic as he had not carried out a study of the Peters property from the point of view of whether development on the property would in fact cause pollution to the Sydney water supply.

Mr. Bailey stated that there is a greater bacteriological activity on the Sydney River watershed than the Sydney watershed which he suggested probably was caused by development on the Sydney River watershed.

The Appellant, Charles Peters, testified that he is the owner of the subject lands having acquired title to these lands from his aunt about three years ago. He stated that the property had been formerly used for agricultural purposes and as a wood lot. He applied to the Municipality of the County of Cape Breton for a building permit and was advised that he would have to have his lands rezoned before he could obtain a permit. He pointed out that there has been a C.B.C. building located across the road from his property since 1972. This property has a transmission station and tower on it and people come there on a daily basis. He stated he has been to the County Council on two occasions in his efforts to build a single family dwelling on his property. He stated that he has planted 25,000 fir trees on his property and has removed the dead wood. He stated that he had applied to the City of Sydney for permission to build and had been refused.

Mr. Peters stated that he proposed to build a dwelling on his property 300' from the highway. He expressed the opinion that the construction of a dwelling on his lands with a proper sewage disposal system would not cause pollution to the Sydney Water Supply System. He said the only dwelling in the subject area was the Patrick Ormond house located on the west side of the old Sydney-Louisbourg Highway. He said there is a man-made ditch which passes through his lands but he hasn't noticed anyone maintainig this ditch since he acquired title to the lands.

On cross-examination Mr. Peters agreed that municipal tax bills for the subject property were in the name of the heirs of James Moriarity c/o Mr. Peters. It also appeared that the deed to Mr. Peters dated April 4, 1983 from the sole surviving heirs at law of James Ignatius Moriarity had never been recorded. A photocopy of this deed was filed as Exhibit S-11.

According to Mr. Peters the ditch running through his property never carried water from Bray Lake to the City's reservoir. Mr. Peters also denied that Sullivan's Brook runs through his lands. This evidence about the location of Sullivan's Brook is contrary to the City of Sydney watershed map filed as Exhibit S-5 which shows Sullivan's Brook running from the City Reservoir through the Peters property. This map also indicates that a ditch runs from Bray Lake and joins Sullivan's Brook on the Charles Peters property.

Patrick Ormond, a resident of Mira Road on lands adjoining the Peters property was called by Counsel for Mr. Peters. Mr. Ormond said his land is situate on both sides of the Mira Road (old Sydney-Louisbourg Highway) but his house is on the west side of the Road. He stated he is familiar with the ditch referred by Mr. Peters which he said was built in 1911 when he was 11 years of age. He is presently 82 years of age and has lived on the Mira Road all his life time. He said that the ditch was built to bring water from Bray Lake to the City's water reservoir. He also stated that no portion of Sullivan's Brook goes through the Peters property.

On cross-examination Mr. Ormond stated that the ditch in question does go through Mr. Peters property and runs into Sullivan's Brook. He also said he had never offered to sell his property to the City nor had the City offered to buy it. He said his house is located 500' to 800' from the new Sydney-Louisbourg Highway. He also stated that he used his lands on the east side of the highway as a wood lot.

Anna Steele, a certified engineering technician with a Diploma in Environmental Technology was the last witness called by Counsel for Mr. Peters. She is employed by the N.S. Department of Environment. In 1980 she carried out a study of the City's water supply system. She stated that if Mr. Peters followed instructions from the Department of Health for a septic tank and disposal field she would have no concerns from an environmental point of view in Mr. Peters building on the subject property. She had personally inspected the Peters property and had noticed a ditch which led to a brook. She could not forsee any significant pollution problems in Mr. Peters building a single family dwelling on his property. She wasn't so certain about other uses permitted in the A-2 Zoe especially recreational uses. She identified a number of colour pictures she had taken. S-13 is a series of four pictures two of which show a bog area located south west of Bray Lake and two of which show the ditch on Mr. Peters property. S-14 is a series of five pictures showing the concrete culvert where it joins Sullivan's Brook. S-16 shows some debris on the west shore of Bray Lake and pictures of a portion of Bray Lake.

On cross-examination Mrs. Steele agreed that her department reacts to a complaint, then investigates the complaint and files a report. She agreed that septic systems if not properly maintained will not function properly and could therefore cause pollution. She agreed with Counsel for the City that the City owes a duty to its water users to provide safe drinking water. She also admitted that the best way to protect a water supply is to prohibit development on the watershed.

In a post hearing submission counsel for the City argued that the subject lands are within the watershed of the source of water supply of the City of Sydney, and that the Board should allow the City's appeal for three reasons, namely:

> "(i) The County Council did not act judicially;
>
> (ii) the decision of the County Council is inconsistent with or unnecessary for the protection of the interests of the municipality; and
>
> (iii) that extraordinary and compelling circumstances are present which dictate that the proper zoning of the subject lands is Watershed (WS) Zone."

Counsel for the City cites Jones, J. in the case of Lord Nelson Hotel Limited v. City of Halifax, 33 D.L.R. (3d.) 98, a decision of the Appeal Division of the Supreme Court of Nova Scotia, as authority for the proposition that in considering an application for rezoning a Council exercises a judicial function. Counsel then refers to Sections 288-291 of the City Charter which sets out the City's authority to make by-laws regarding water works and water supply. He then submits:

"that these sections of the City Charter

> vest in the City Council of the City of Sydney definite rights regarding the lands which are the subject of this Appeal. The County Council was made aware of this -(See Exhibit S/4 - Report from Metro Planning Commission and also letter from City Solicitor in same Exhibits) - but completely ignored the provisions of the City Charter; which, it is contended, could not be ignored if the County Council acted 'judicially' as it was legally bound to do."

Counsel for the City then cites the Azar et al v. City of Sydney (1958) 15 D.L.R. (2d.) 124 a decision of the Supreme Court of Nova Scotia where MacDonald, J. stated that "the Legislature must be presumed to have excluded the provisions of that general act (Public Utilities Act) from the particular situation envisioned in the special and later legislation enacted in 1957 in relation to the Sydney watershed". He then concludes by submitting that "this same reasoning applies in respect to the provisions of the Planning Act viz-a-viz the provisions of the City Charter watershed provisions as the Planning Act contains no provisions or clauses to curtail the provisions of the City Charter in this regard.

It is the further submission of Counsel for the City that "the provisions of the Water Act, R.S.N.S. 1967, chapter 335, have no application to the Sydney Watershed, and also that the control of building within this watershed is the sole jurisdiction of the City Council of the City of Sydney."

Finally, Counsel for the City contends that "the County Council was legally bound to act judicially and consider the provisions of the City Charter as it pertains to the lands in question and this the County Council failed to do."

The second reason given by the City in support of the City's position that the decision of the County Council should be reversed is that the decision is inconsistent with and unnecessary for the protection of the best interests of the municipality (i.e. the Municipality of the County of Cape Breton). The City refers to the decision of the Provincial Planning Appeal Board in the appeals of the Town of North Sydney and the Town of Sydney Mines from a decision of the Council of the Municipality of the County of Cape Breton rezoning lands near Pottle's Lake from Agricultural to Commercial for purposes of a proposed shopping centre. This decision is reported in Volume 4 page 306 of the Provincial Planning Appeal Board Reports.

A portion of these lands were situate on the watershed of Pottle's Lake which is the source of water supply for the Towns of North Sydney and Sydney Mines and also a portion of the Municipality of the County of Cape Breton. The Board in that case held that "it would not be in the best interest of the Municipality of the County of Cape Breton or of the Town of North Sydney and Sydney Mines to confirm the decision of the Council respecting the rezoning of the entire subject site because of possible pollution to Pottle's Lake from any construction or development on that portion of the subject site which lies within the watershed area of Pottle's Lake."

Counsel for the City argues that the only evidence of the best interest of the Municipality of the County of Cape Breton "was the fact that the County would benefit from the increased assessment of this one house proposed to be built by Mr. Peters on the subject land". He then submits that "can this miniscule benefit be compared to the possible contamination of water to the many residents of the County which presently use Sydney water?"

Counsel for the City in support of his third reason why the Board should reverse the decision under appeal directs the Board's attention to Section 63(7)(b) of the Planning Act which state that:

> "(7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (b) extraordinary and compelling circumstances are present."

After pointing out that s.s.(7) of Section 63 of the Planning Act was added in 1983 he submits that "surely the circumstances in the matter before the Board is in the very nature of what the legislature intended when it passed this addition to the Act". He submits that "Is there any doubt that extraordinary and compelling circumstances are present here? 'Extraordinary' because this matter deals with the water supply for thousands of people. 'Compelling' because the evidence before the Board strongly suggests that the only policy for protection is one of no development."

The Board does not agree with the submission of Counsel for the City with respect to s.s. (7)(b) of Section 63 as s.s. (7) only applies in the situation where the Board allows an appeal by an "applicant" (emphasis added). In this appeal the Appellant is the Council of the City of Sydney and the Appellant is not the Applicant. The Applicant is Charles Peters. Therefore s.s. (7) of Section 63 has no relevance to this appeal.

Counsel for the land owner Charles Peters filed a post-hearing submission in which he states that "the only issue before this Board is whether or not the City of Sydney can meet the onus of having the Board interfere with the decision of Council on the basis that the decision of Council was inconsistent or unnecessary for the protection of the best interests of the Municipality of the County of Cape Breton". He further submits that "the City of Sydney is attempting to have the Board enforce its City Charter as it applies to the use of watershed property" and "this is not the purpose of this appeal". He also submits that "the enforcement and legality of the City of Sydney Charter should be, ... the subject of another court at another time."

Counsel for Mr. Peters submits that there is no evidence that the construction of a dwelling by Mr. Peters would jeopardize the City's water supply. He also submits that his client would be required to meet all Department of Health specifications respecting the design and construction of a sewage disposal system. He also referred to several provincial statutes which are designed to prevent his client from polluting the water system, namely, the Environmental Protection Act, S.N.S. 1973, c. 6, the Health Act, R.S.N.S. 1967, c. 247 and the Water Act, R.S.N.S. 1967, c. 335. After quoting some specific sections of these Acts, he submits that "in light of the foregoing Acts, it is submitted that Mr. Peters would not and, in fact, could not in any way create any risk to the water supply of the City of Sydney by using his land for any of the uses prescribed in A-2 Zone".

The following are extracts from the various Acts referred to in the brief filed by Counsel for Mr. Peters.

> "(a) Environmental Protection Act, S.N.S. 1973, c. 6:
>
> Section 3 of this Act reads as follows:
>
> 'The purpose of this Act is to provide for the preservation and protection of the environment.'
>
> Subsection 8(1) reads in part:
>
> 'The Minister for purposes of the administration and enforcement of this Act and regulations has the power to
>
> (c) investigate and control problems of pollution, waste management, waste disposal, litter management and litter disposal;
>
> (o) regulate and control the location, construction and operation of any plant, structure, facility, undertaking or thing that will or is likely to discharge waste or a contaminant into the environment or otherwise cause pollution;'

Section 23 of this Act reads as follows:

'23(1) No person shall own, occupy, operate or be responsible for the operation of a plant, structure, facility, undertaking or thing that discharges, releases, deposits drains, emits or threatens or allows the discharge, release, deposit or drainage or emission of waste into the environment or otherwise causes or tends to cause pollution unless he has obtained a permit from the Miister.

(2) Subject to subsection (3), no person owning, occupying, operating or responsible for the operation of a plant, structure, facility, undertaking or thing shall remove any material from the environment, the removal of which causes or tends to cause pollution, without a permit from the Minister.'

Environment, pursuant to Section 2(g) of the Act, is defined as follows:

'(g) "environment" means the air, land and water, or a combination or part thereof within the jurisdiction of the Province;'

(2) Health Act, R.S.N.S., 1967, Chapter 247:

Section 11 of the Health Act reads as follows:

'11(1) The Minister, with the approval of the Governor in Council, may make regulations with respect to any matter relevant to the public health, and, without restricting the generality of the foregoing, may make regulations:

(b) to provide for safe and potable water supplies, for the control of sources of water and systems of distribution, and for the purpose of preventing contamination or pollution of water that is used for human consumption;'

(3) Water Act, R.S.N.S., 1967, Chapter 335:

Section 2 of the Water Act reads as follows:

'2 Notwithstanding any law of Nova Scotia, whether statutory or otherwise, or any grant, deed or transfer heretofore made, whether by

> the Crown or otherwise, or any possession, occupation, use or obstruction of any water course [watercourse], or any use of any water by any person for any time whatever, every water course [watercourse] and the sole and exclusive right to use, divert and appropriate any and all water at any time in any water course [watercourse] is vested forever in the Crown in the right of the Province of Nova Scotia, and shall be deemed conclusively to have been so vested since the sixteenth day of May, 1919, and is fully freed, discharged and released of and from every fishery, right to take fish, easement, profit a [a] prendre and of and from every estate, interest, claim, right and privilege whatsoever, whether or not of the kind hereinbefore enumerated, and shall be deemed conclusively to have been so fully freed, discharged and released since the sixteenth day of May, 1919.' (emphasis added)
>
> Section 8(1) of the Water Act reads as follows:
>
> '8(1) The Minister may order any person not to discharge or to discontinue the discharge of any material of any kind into a water course [watercourse], provided that this Section shall not apply if the discharge of material into a water course [watercourse] is approved
>
> pursuant to the provisions of the Health Act, any other Act, or any rule, regulation, order or by-law in accordance with the provisions of the Health Act, or any other Act.'"

Counsel for the Municipality of the County of Cape Breton filed a post-hearing brief in which he submits that the general legislation overrides special acts and therefore "the Planning Act takes precedence over the Sydney City Charter, thereby allowing only the County to determine by-laws for land use within its boundaries". He also submits that the City cannot rely on the provisions of Section 63(7) of the Planning Act as the City was not the "applicant". He further submits that the Board is prohibited from interferring with the Council's decision under s.s.

(6) of Section 63 of the Planning Act unless the Board can conclude that the Council's decision "is inconsistent with or unnecessary for the protection of the best interests of the municipality". He submits that "Municipality" referred to in s.s. (6) means the Municipality of the County of Cape Breton and that there is an onus on the Appellant, the City to prove that the Council's decision was inconsistent or unnecessary for the protection of the best interests of the Municipality of the County of Cape Breton.

Counsel for Mr. Peters submits that the Council of the Municipality of the County of Cape Breton acted in the best interests of the Municipality in making the decision under appeal for seven reasons as follows:

> "1. The construction of a single family dwelling on the site would increase the assessed value of the property and consequently increase the County's tax revenue.
>
> 2. The presence on the site of the owner would ensure that the property was being maintained. Mr. Peters has begun a cleanup of the property and has improved it by clearing windfalls and damaged wood.
>
> 3. The existence of other dwellings within the watershed have not posed a problem for or threat to the water supply.
>
> 4. The minor flow of water across the Peters' land is an insignificant portion of the City water supply and is of questionable quality at best.
>
> 5. The location of any dwelling would be away from the ditch and is more than a mile away from the City reservoir.
>
> 6. The poor quality of the City's

> water demands total disinfection. The low potential threat presented by one dwelling would be countered by the chemical treatment the water received prior to distribution to consumers.
>
> 7. The lot size requirement in an A2 Zone is 40,000 square feet, thereby effectively preventing any large scale residential development on the subject lands as well as provide additional safeguards for on-site sewage disposal."

This appeal raises some difficult and important questions. What is the responsibility, if any, of a Municipality in whose jurisdiction is located the watershed of another Municipality used as a source of supply of drinking water to thousands of persons to ensure the protection of that watersupply or to refrain from taking actions which might result in causing some pollution to the water supply? Certainly no responsible municipal council would take any action which could be reasonably expected to cause pollution to any public water supply system whether such water supply area lies within or without the jurisdictional boundaries of the municipality taking such action.

The Municipality of the County of Cape Breton created a water supply area (WS) Zone in order to restrict development on water supply areas to lots containing a minimum area of ten (10) acres and restricting development to "Forestry uses, but not related processing plants, conservation and water supply related uses" (Part 30 of the Municipality's Land-Use By-law - Exhibit S-3). Presumably the Municipality in creating this WS Zone and in zoning the subject land WS did so on the basis that this was in the best interests of the Municipality. On December 14, 1984, when the Council of the Municipality of the County of Cape Breton rezoned the subject lands from Water Supply (WS) Zone to Agricultural (A-2) Zone was this decision inconsistent with or unnecessary for the protection of the best interests of the Municipality of the County of Cape Breton? This is the question which the Board must determine under the provisions of s.s. (6) of Section 63 of the Planning Act S.S. (6) provides that:

> "Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the Council is inconsistent with or unnecessary for the protection of the best interests of the municipality."

It is the Board's opinion that it must make its determination pursuant to s.s. (6) of Section 63 despite the provisions of Section 290A(1) of the Charter of the City of Sydney. The Appeal by the City is made pursuant to the provisions of the Planning Act, S.N.S. 1983, c. 9, and the Board is obliged to follow the provisions of s.s. (6) of Section 63 of the Planning Act which provides a clear direction to the Board in this appeal.

The difficult task for the Board in this case is to determine whether the evidence given at the hearing is sufficient for the Board to "interfere" with the Council's decision because the decision is either "inconsistent with" or "unnecessary for" the protection of the best interests of the municipality".

The evidence of Anna Steele, a certified engineering technician employed by the Department of Environment is that the construction of a single family dwelling on the subject property would not likely pollute the water supply of the City of Sydney if Mr. Peters followed instructions from the Department of Health with respect to the installation of a septic tank and sewage disposal field. On the other hand she admitted on cross-examination that the best way to prevent pollution to a public water supply system is to prohibit development on the watershed.

The evidence of the planners, Malcolm Gillis and Douglas Foster, is that the decision under appeal was not made in the best interests of the Municipality of the County of Cape Breton. The planners cite the fact that if this rezoning were permitted it would constitute a precedent for other applications which would be difficult to refuse. Mr. Foster's evidence is that the Water Act, R.S.N.S. 1967, c. 335 does not provide adequate safeguards for the protection of the City's water system.

It appears from the report of Mr. Gillis that there are some water users of the City's water supply system resident in the Municipality of the County of Cape Breton and any decision of the Municipality which might create pollution of the City's water supply system would in the opinion of the Board be inconsistent with or unnecessary for the protection of the best interests of the Municipality of the County of Cape Breton.

The Board is concerned that the decision of the Council in approving A-2 zoning for the subject property has opened the door for any of the permitted uses under the A-2 Zone and some of these permitted uses create the possibility of causing pollution to the City's water supply. The permitted uses in the A-2 Zone include all agricultural uses, recreational uses, kennels, tourist cabins and day nurseries. Some agricultural uses where cattle and horses would be on the subject property and recreational uses, kennels, tourist cabins and day nurseries are all uses which have the distinct possibility of causing pollution to the water supply system. It is of course, the stated purpose of Mr. Peters to use his property to construct a single family dwelling but he would have the right to use his property if rezoned A-2 for some of the other enumerated uses in that Zone.

The range of permitted uses in the Municipality's A-2 Zone is simply too broad to be an appropriate zone for lands on a watershed forming part of the water supply system for thousands of persons.

It is the Board's opinion that the City has met the onus on it as Appellant to lead evidence that the decision under appeal was not made for the protection of the best interests of the Municipality of the County of Cape Breton.

The Board therefore in allowing this appeal does so not because of the provisions of Section 290A of the

City's Charter but does so on the basis of s.s.(6) of Section 63 of the Planning Act.

It is noted that Section 290A of the City's Charter does not absolutely prohibit development on the watershed of the City's water supply but prohibits development unless the Council of the City by resolution authorizes construction or declares the land does not form part of the watershed for purposes of s.s.(1) of Section 290A, provided the City Medical Officer certifies that the development can take place without danger of polluting the City's water system. Therefore, the City's own legislation makes it possible in certain conditions for development to take place on the watershed in question if a certificate is obtained from the City's Medical Officer and the City Council passes the necessary resolution. In this case the City not only refused to give its necessary consent to Mr. Peters but opposed the application for rezoning. (See copy of letter dated December 7, 1984, from the City Solicitor to the Council of the Municipality of the County of Cape Breton filed as part of Exhibit S-4). There is no evidence before the Board as whether or not the City's Medical Officer was prepared to issue a certificate under the provisions of Section 290A of the Charter.

The land owner, Mr. Peters, is not without recourse. He may if he so chooses, invoke the provisions of Section 290A of the City Charter to require the City to purchase his land within 60 days if he offers it for sale to the City or immediately thereafter expropriate the land subject to the determination of value by means of arbitration.

In the result the appeal by the City of Sydney is allowed and the Board reverses the decision of the Council of the Municipality of the County of Cape Breton rezoning lands of Charles Peters from Watershed (WS) Zone to Agricultural (A-2) Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 4th day of June, A.D., 1985.

R.H. BLOIS,

CHAIRMAN, NOVA SCOTIA
MUNICIPAL BOARD.

Tenwolde Developments Limited v. City of Dartmouth

PLANNING--ZONING AMENDMENT--REFUSAL--R-1 TO TH TO PERMIT TOWNHOUSES--REASONABLY CARRIES OUT INTENT OF M.P.S.--UNDUE HARDSHIP--PLANNING ACT, SS.63(1),(3),(7)--CITY OF DARTMOUTH M.P.S. POLICIES G-4, T-10, IMPLEMENTATION POLICY 1P-1(c)

This is an appeal from a decision of the Council of the City of Dartmouth refusing to rezone 5.5 acres of land situate about 500 feet north of the Mic Mac Rotary from Single Family Residential (R-1) Zone to Town Housing (TH) Zone to permit the construction of townhouses.

HELD: The Board allows the appeal by instructing Council to rezone the property from R-1 to TH.

In an appeal such as this, the Board shall, pursuant to s.63(3) of the Planning Act, determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy (M.P.S.). With respect to the reference in s.63(7)(a) to "undue hardship," the Appellant did not make an effective case that the financial cost of an appeal to the Board was an "undue hardship." The provisions of the M.P.S. most relevant to this appeal are transportation policy T-10 and the criteria for rezoning outlined in the implementation section. The Director of Planning for the City concluded that the proposed rezoning was consistent with the policies of the M.P.S., represented good planning and was worthy of Council's approval. The evidence against rezoning given by an architect called by the City was that the proposed rezoning was not in accord with 3 policies. One is compatibility with adjacent uses. The Board believes any residential development on the subject property would affect at least some homes in the area because of the height differential. The proposal of the developer recognizes this problem and deals with it as effectively as possible. The second policy relates to detrimental economic or social effects on other areas of the City. The evidence suggested that the development would have a detrimental social effect on the adjacent area. However, it is "other areas of the City" and not the immediate neighbourhood to which this policy applies. The third policy relates to type of use, density and phasing. Density is a legitimate concern, however, the existing TH Zone restrictions together with the difficulties of the site would be sufficient limitations to ensure good development. With respect to traffic problems, the Board accepts the evidence that the development "is not premature or inappropriate" for traffic or transportation reasons. The Board does not accept the opinion of Counsel for the City that if the M.P.S. contains any provision which would be inconsistent with the proposed amendment, then the decision of Council should be upheld. The Board is required to determine whether the decision "reasonably" carries out the intent of the M.P.S. The Board concludes the decision does not reasonably carry out the intent of the M.P.S.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, S.N.S., 1983;

- and

IN THE MATTER OF: An Appeal by **TENWOLDE DEVELOPMENTS LIMITED**, of Dartmouth, Nova Scotia, from a decision of the Council of the City of Dartmouth made August 28, 1984, refusing to amend the City's Land-Use By-law by rezoning 5.5 acres of land known as the Brown property, situated north of the Mic Mac Rotary and to the rear of lots fronting on Braemar Drive, Maple Street and Fourth Street from Single Family Residential (R-1) Zone to Town Housing (TH) Zone to permit the construction of Townhouses.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman.

COUNSEL: MICHAEL C. MOORE, LL.B., and DAVID HOWLETT, LL.B., for the Appellant,

MICHAEL H. MOREASH, LL.B., and SUZANNE E. HOOD, LL.B., for the City of Dartmouth.

DECISION

This is an appeal by Tenwolde Developments Limited from a decision of the Council of the City of Dartmouth made August 28, 1984, refusing to amend the City's Land-use By-law by rezoning 5.5 acres of land known as the Brown property, situate north of the Mic Mac Rotary and to the rear of lots fronting on Braemar Drive, Maple Street and Fourth Street from Single Family Residential (R-1) Zone to Town Housing (TH) Zone to permit the construction of Townhouses.

The Appellant's Notice of Appeal (Exhibit T-1) is dated September 17, 1984, and was received by the Board on the same day. The appeal was heard November 28th and 29th, 1984, in the Council Chambers of the City of Dartmouth. At the conclusion of the hearing final briefs were submitted to the Board by both the Appellant and the Respondent.

At the commencement of the hearing, Counsel for the Appellant filed with the Board four Affidavits of Service of the Notice of Hearing. Counsel agreed that the appeal was properly before the Board and the Board had jurisdiction to hear the merits of the appeal.

Counsel for the Appellant called six witnesses, Counsel for the Respondent called seven. Six persons who attended the hearing gave evidence.

The appeal is brought pursuant to Subsection 63(1) of the Planning Act which reads as follows:

> "The amendment, revision or refusal by a council to amend or revise the land-use by-law may be appealed by:
>
> (a) an aggrieved person;
>
> (b) the applicant;
>
> (c) the Director;
>
> (d) the council of an adjoining municipality."
> (emphasis added)

The Notice of Appeal sets forth the following grounds of appeal:

> "...the ground of appeal is that...
>
> 1. The proposed amendment complies with and is consistent with the intent of Policy G-1 of the Municipal Planning Strategy, at page 18 thereof, which states that:

> 'It shall be the intention of City Council to retain a development boundary (as shown on the Maps 1, 1A, 1C, 1D, and Map 1E) and direct future development to areas that are presently serviceable within it.'

and the decision of the City Council to refuse the application for amendment violates Policy G-1 by failing to seek, encourage and facilitate developments which make better utilization of existing services;

2. The proposed amendment complies with and is consistent with the intent of Policy G-4 of the Municipal Planning Strategy, at page 18 thereof, which states that:

> 'It shall be the intention of City Council to investigate the possibilities and options for redevelopment of areas throughout the City to make better utilization of existing services.'

and the decision of City Council to refuse the application for amendment violates Policy G-4 by failing to seek, encourage and facilitate developments which make better utilization of existing services;

3. The APPELLANT'S application rejected by City Council is one contemplated by Section 2 at page 22 of the Municipal Planning Strategy, which provides that:

> 'There are several large strategicly located land holdings inside the development boundary. Given their size, location and the manner in which they are developed, they will have a significant impact on the total residential environment of the City. These holdings for the most part presently permit only R-1 uses. Due to their location and land value, it is likely that they will be developed to some form of mixed housing.'

4. The decision of City Council is contrary to Policy 1P-1(c) of the aforesaid Municipal Planning Strategy, in that the City Council did not have regard to, or did not adequately regard, the factors set out in Policy 1P-1(c) thereof, and the information and recommendations pertaining thereto provided by the Department of Planning

and Development of the City of Dartmouth in a zoning report dated March 27, 1984. The aforesaid factors which must be considered upon making amendments to the Land-use By-law to permit townhouse dwellings and which were not properly considered by the Council, are set out in Policy 1P-1(c) at pages 60 and 61 of the aforesaid Municipal Planning Strategy:

In considering zoning amendments and contract zoning, Council shall have regard to the following:

1P1(c) (1) That the proposal is in conformance with the policies and intents of the Municipal Development Plan;

(2) That the proposal is compatible and consistent with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal;

(3) Provisions for buffering, landscaping, screening and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries;

(4) That the proposal is not premature or inappropriate by reason of:
i) the financial capability of the City is to absorb any costs relating to the development;

ii) the adequacy of sewer and water services and public utilities;

iii) the adequacy and proximity of schools, recreation and other public facilities;

iv) the adequacy of transportation networks in, adjacent to, or leading to the development;

v) existing or potential dangers for the contamination of waterbodies or courses or the creation of erosion or sedimentation of such areas;

vi) preventing public access to the shoreline or the waterfront;

vii) the presence of natural, historical features, buildings or sites;

viii) create a scattered development pattern requiring extensions to truck facilities and public services while other such facilities remain underutilized;

ix) the detrimental economic or social effect that it may have on other areas of the City;

(5) That the proposal is not an obnoxious use;

(6) That controls by way of agreements or other legal devices are placed on proposed developments to ensure compliance with approved plans and coordination between adjacent or nearby land uses and public facilities. Such controls may relate to but are not limited to, the following:

i) type of use, density and phasing;

ii) emissions including air, water, noise;

iii) traffic generation, access to and egress from the site, and parking;

iv) open storage and landscaping;

v) provisions for pedestrian movement and safety;

vi) management of open space, parks, walkways;

vii) drainage both natural and sub-surface and soil stability;

viii) performance bonds;

(7) Suitability of the proposed site in terms of steepness of slope, soil conditions, rock outcroppings, location of watercourses, marshes, swamps, bogs, areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors;

(8) That in addition to the public

> hearing requirements as set out in the Planning Act and City By-laws, all applications for amendments may be aired to the public via the 'voluntary' public hearing process established by City Council for the purposes of information exchange between the applicant and residents. This voluntary meeting allows the residents to clearly understand the proposal previous to the formal public hearing before City Couincil;
>
> (9) That in addition to the foregoing, all zoning amendments are prepared in sufficient detail to provide:
>
> i) Council with a clear indication of the nature of proposed development, and
>
> ii) permit staff to assess and determine the impact of such development would have on the land and the surrounding community.
>
> 5. The decision of City Council is not based on any proper planning law principles appropriate to residential areas in the City of Dartmouth.
>
> 6. That the Appellant has suffered undue hardship as a result of the decision of City Council.
>
> 7. Such other grounds as may arise from the evidence presented at a hearing before the Nova Scotia Municipal Board."

Counsel for the Appellant informed the Board that he did not intend to proceed with Ground No. 2.

The lands which are the subject of this appeal are the property of Hazel Roberta Lund (formerly lands of Shirley Roberta Brown, deceased). Tenwolde Bros. Company Limited, a related company to the Appellant, Tenwolde Developments Limited, has an agreement of purchase and sale with Mrs. Lund who resides at 106 Braemar Drive, a property abutting the subject property. The Notice of Appeal alleges that the purchaser's interest under this agreement was assigned to the Appellant.

The 5.5 acre subject property is roughly triangular in shape with 2 access points to Braemar Drive which lies to the west of the subject property. Road access to the property is proposed from Braemar Drive over the property at its most southerly point. The Mic Mac Rotary is approximately 500 feet south of the proposed access road. There is a rectangular section jutting out from the basically triangular shape of the property comprising 3 residential lots which front on Braemar Drive to the north of the proposed access road. Between the proposed access road and the three-lot extension lies the property of Mrs. Lund. Except for these two portions of the property which have frontage on Braemar Drive, the remainder of the subject lands is bounded by the rear property lines of lots fronting on Braemar Drive, Maple Drive and Fourth Street. The subject property is heavily wooded and slopes from north to south and from east to west at rates varying from 12½% to 25%, the steepest slope being in the southern proposed access portion of the property.

Peter Connor, an architect with Tenwolde Developments Limited, described the subject site and the townhouse development proposed for it. Mr. Connor characterized the neighbourhood as a well established residential area developed approximately 20 years ago as the Walker Subdivision, with many community facilities in close proximity - transit, the YMCA, swimming at Graham's Grove, two schools, shopping on Main Street or Mic Mac Mall and 2 nearby churches. Within the immediate area he stated that there was a "modest mixed use of housing types", including a sixplex on Maple Drive and a townhouse development approximately 1000 feet distant. Mr. Connor described the site as land-locked by existing development with few vacant lots surrounding it except for the three which front on Braemar Drive where there is an extreme grade separation between Braemar Drive and the subject site. Mr. Connor explained that the developer's intention was to construct 50 townhouses arranged in 8 blocks, each containing varying numbers of units. The townhouses would be finished with brick and cedar. The units on the upper portion of the site would be 3 stories at the front or street side and 2 stories at the rear. The units on the lower portion of the site would be 2 stories high on the street side and 3 stories high at the rear. The townhouses would be 34 feet and 24 feet high to the roof peak, depending on the number of stories. Each townhouse would be 1500 square feet in size and would sell for $90,000.00 - $95,000.00. Many of the townhouses on the lower portion of the site would have garages, most upper townhouses would not. Each unit would be allocated 2½ parking spaces.

Mr. Connor stated that the developer intended both to plant additional trees and to retain as many trees on site as possible to provide a buffer between the townhouses and the existing surrounding residential development. Walkways connecting the townhouse development with Fourth

Street and with Braemar Drive are planned. No townhouse unit is intended to be less than 25 feet from adjacent property lines but in some locations that distance could be up to 100 feet. Only 5 townhouses would be set back the minimum 25 feet. Mr. Connor stated that the subdivision plan for the development had not been approved as yet but he believed that it substantially met all the requirements for approval.

In cross-examination Mr. Connor stated that individual freehold ownership or condominium ownership had not yet been decided upon by the developer, but that the rental of units would be unlikely. Mr. Connor said tree retention by property owners would be ensured by deed covenant or by condominium by-laws depending on which type of townhouse ownership was chosen. Mr. Connor agreed that the curbside parking lot associated with specific units (12 spaces in total) would not be available in winter.

Mr. Philson J. Kempton, an accredited appraiser as well as a real estate agent, with 12 years of appraisal experience for governments, mortgage companies and trust companies, estimated the effect of the proposed townhouses on the property values of the existing development in the area. In Mr. Kempton's opinion the 20 homes immediately adjacent to the subject property range in value from $45,000.00 to $75,000.00 with the majority being in the $50,000.00 to $65,000.00 range. Mr. Kempton evaluated a number of areas of Dartmouth to attempt to identify any pattern of decreases in market value of detached homes located near townhouses and was unable to find any examples of such an adverse affect. In Mr. Kempton's opinion townhouses of a lower value than existing single family residential development could have a depreciating effect on the market value of the single family homes. However, he believed that because the townhouses proposed for the subject property are intended to be in the $90,000.00 price range, their higher market value than the existing residential development in the area will ensure that any effect on immediately adjacent properties will be marginal if any.

Mr. Jack Klein, a qualified and experienced architect from Toronto, gave evidence on his experience with "ground-related multiple housing". An article entitled "The Row House - its place in the urban community" written by Mr. Klein for the Canadian Housing Design Council of which he was a member for seven years and sometime president, was filed as Exhibit T-10. With reference to the article, Mr. Klein explained the characteristics and assets of row houses or townhouses and commented on the development proposed for the subject property. Mr. Klein stated that townhouses are a more effective use of land than single family housing and make better use of municipal services.

Commenting on the intended townhouse development, Mr. Klein stated that the subject site is a difficult one to develop and the architect's plans show an appropriate use of the site for townhouses. Mr. Klein felt that the entry portion of the access road was at the upper limit of acceptable grades but that nearby Maple Drive is steeper. He agreed that a 25 foot rear yard setback is appropriate for this development because of the semi-urban nature of existing surrounding development although he has designed townhouse projects with 15 foot rear yard setbacks. Mr. Klein approved of the design for the proposed townhouses which would be 2 storeys in the front and 3 storeys in the rear, or vice versa, as the best approach by the architect to a difficult site, using the cross slope of the site to best advantage. Mr. Klein stated that privacy considerations in the relationship of the proposed development to the existing adjacent single family homes would be helped by both the change in grade between the subject property and surrounding development and by the existing stand of trees on the site. He further said that "any reasonable expectations of privacy" could be realized on this site and that in his opinion the grade differential was a better visual barrier than the trees. In his opinion, up to 30 townhouse units per acre was considered medium density, so the proposed 9.5 units per acre was a modest density.

Mr. Donald Bayer, Director of Planning and Development for the City of Dartmouth since 1972 commented on staff reports to City Council dated March 27th and April 24th, 1984, (Exhibit T-11) on the Appellant's rezoning application, and on the reasons why approval of the requested rezoning was recommended to Council in both the original and the supplementary report.

The March 27, 1984, staff report to Council, written by Glenn L'Esperance, Development Officer, but collectively approved by the members of the Planning and Development Office states in part:

> "The property is vacant at present and contains 5.5 acres. The developer wishes to develop approximately 51 townhouses along a cul-de-sac entering the property from Braemar Drive. The projected population is 150 persons, with an estimated 15 elementary students, 8 junior high students and 8 senior high students. The property is steep and heavily wooded. The proposal is intended to minimize site disturbance while preserving mature tree cover where possible, and takes advantage of the topography and view of the lake.
>
> The property is surrounded on all sides by single-family residences. The City of Dartmouth Townhouse Zone permits, as of right, up to 15 townhouse units per acre. This proposal is for 9.5 units per acre while a typical single family density is between 4 and 6 units per acre.
>
> The project has been reviewed as follows:
>
> 1. Lakes Advisory Board - This project was reviewed by the Board at their meeting on March 14, 1984. The Board did not object to the preliminary proposal, and requested that the developer appear again before the Board at the time when detailed engineering plans are ready (copy of Lakes Advisory Board Minutes attached.)
>
> 2. Engineering Department - The attached report states that existing water, sanitary sewer and storm sewer systems are adequate for this development.
>
> 3. School Administration Office - In the attached report, the School Administration Office has stated that accommodating school children generated by this project will not create any difficulty.

4. Traffic - The proposed access to Braeside Court from Braemar Drive has been reviewed by the Department of Transportation and the Traffic Management Group. The D.O.T. have stated the access point is beyond the limit of their existing control of access for the Mic Mac Rotary and is compatible with their present plans for future improvements to the rotary (D.O.T. letter attached). The T.M.G. sees no conflict between the access point and proposed improvements to Braemar Drive.

5. Fire Department - The Fire Chief has stated on the attached memo that the proposed development meets the requirements of the Department.

6. Planning & Development - The proposed development is consistent with the policies of the Municipal Planning Strategy.

It is this Department's opinion that this project is compatible with both the topography and the neighbourhood. We would suggest that a pedestrian walkway to Fourth Street be included.

Accordingly, it is our recommendation that City Council proceed with this application."

The supplementary staff report, dated April 24, 1984, also written by Mr. L'Esperance, states:

"On Tuesday April 10, 1984, City Council instructed staff to proceed to the neighbourhood information meeting stage of the rezoning process.

The meeting was held on Wednesday April 18, 1984. A copy of the information meeting report is attached. along with the necessary by-law to permit Council to consider this application.

As a result of comments made at the neighbourhood information meeting, the developer has adjusted his site plan (attached) such that there are now two pedestrian walkways included and that a number of townhouses, particularly along the back of homes on Braemar Drive, have been relocated to afford a higher level

> of privacy to existing homes.
>
> It is this department's recommendation that the requested rezoning be approved."

Mr. Bayer reviewed the application in detail for conformity to the Municipal Development Plan (Municipal Planning Strategy) which was filed as Exhibit T-6, and in particular with regard to the policy direction in Implementation Policy 1P-1(c) which was previously quoted in full in the Appellant's grounds of appeal.

Policy 1P-1(c) sets out criteria to be used by Council in considering applications for zoning amendments and contract zoning as follows:

> [...."Council shall have regard to the following:]
>
> (1) That the proposal is in conformance with the policies and intents of the Municipal Development Plan."

Mr. Bayer stated that the proposed development is located in an area residentially designated and conforms in his opinion to the policy of encouraging infilling as stated in Policy G-4 of the MPS:

> "POLICY G-4 -It shall be the intention of City Council to investigate the possibilities and options for redevelopment of areas throughout the City to make better utilization of existing services."

Policy 1P-1(c) continues as follows:

> "(2) That the proposal is compatible and consistent with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal."

Mr. Bayer felt that the proposed development was consistent with adjacent uses because both would be residential, that the bulk of the proposed development was compatible because it would be pitched roof housing of 2 to 3 storeys, and that the scale was compatible because the proposed townhouse development would not be above 9.5 persons per acre in density although theTownhousing (TH) Zone allows a density of 15 persons per acre.

Policy 1P-1(c)(3) states:

> " Provisions for buffering, landscaping, screening, and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries."

Mr. Bayer felt that the proposed retention of the trees on the site together with the existing land would provide adequate buffering contours. With regard to buffering, Mr. Bayer acknowledged that a development agreement rather than rezoning could give Council more authority, but he was uneasy about the effectiveness of the policing of such an agreement. He said that he believed that the existing Townhousing (TH) Zone restrictions together with the difficulties of the site are sufficient limitations to ensure good development. Mr. Bayer stated that landscaping of the proposed development would be controlled through the existing subdivision by-laws which he felt provided adequate control. "Screening", Mr. Bayer explained, was applicable to commercial developments and was not relevant for the proposed townhouse development. With regard to access control, Mr. Bayer was of the opinion that the developer had done the best possible given the existing problems of the site configuration.

Policy 1P-1(c)(4) states:

> " That the proposal is not premature or inappropriate by reason of:
>
> i) the financial capability of the City is to absorb any costs relating to the development
>
> ii) the adequacy of sewer and water services and public utilities
>
> iii) the adequacy and proximity of schools, recreation and other public facilities
>
> iv) the adequacy of transportation networks in, adjacent to, or leading to the development
>
> v) existing or potential dangers for the contamination of waterbodies or courses or the creation of erosion or sedimentation of such areas
>
> vi) preventing public access to the shorelines or the waterfront
>
> vii) the presence of natural, historical features, buildings or sites
>
> viii) create a scattered development pattern requiring extensions to truck facilities and public services while other such facilities remain underutilized
>
> ix) the detrimental economic or social effect that it may have on other areas of the City."

Mr. Bayer stated that (1) the development would result in no financial cost to the City, (2) the existing water, sewer and electrical services were adequate, (3) schools, recreation facilities and fire protection were all sufficient and in reasonably close proximity, (4) transit service would be available on Baemar Drive (Bus No. 55, Port Wallis), (5) possible waterbody contamination would be monitored by the Dartmouth Lakes Advisory Board, (6) the development would not prevent public access to shorelines or waterfront, (7) natural, historical features, buildings or sites were not present, (8) the development would not create scattered development but rather consolidate it and (9) the development would have no negative economic or social impact on the other areas of the City.

Policy 1P-1(c)(5) states:

> " That the proposal is not an obnoxious use:"

Mr. Bayer stated that the proposed development was not an obnoxious use.

Policy 1P-1(c)(6) states:

> " That controls by way of agreements or other legal devices are placed on proposed developments to ensure compliance with approved plans and coordination between adjacent or nearby land uses and public facilities. Such controls may relate to, but are not limited to, the following:
>
> i) type of use, density and phasing;
>
> ii) emissions including air, water, noise;
>
> iii) traffic generation, access to and egress from the site, and parking;
>
> iv) open storage and landscaping;
>
> v) provisions for pedestrian movement and safety;
>
> vi) management of open space, parks, walkways;
>
> vii) drainage both natural and sub-surface and soil-stability;
>
> viii) performance bonds;"

Mr. Bayer commented that (1) the type of use and density of the development would be controlled by the Townhousing (TH) By-law, (2) air, water and noise emissions would not result from this residential development, (3) traffic generation would put no undue pressure on existing road systems and Braemar Drive is slated for improvements which would assist access and egress to the site, (4) open storage and landscaping was applicable to commercial development, (5) pedestrian walkways will be provided in the development and no sidewalks are required by the subdivision by-law on the access road, (6) the City would probably take cash in lieu of land pursuant to Section 91(2)(e) of the Planning Act because the proximity of recreational facilities would make parkland on the subject property unnecessary, (7) drainage problems are not anticipated by the City engineering department but if they should arise, the Dartmouth Lakes Advisory Board and the engineering department through the subdivision process can cope with them and (8) performance bonds are not necessary because of the subdivision regulations.

Policy 1P-1(c)(7) states:

> " Suitability of the proposed site in terms of steepness of slope, soil conditions, rock outcroppings, location of watercourses, marshes, swamps, bogs, areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors;"

In Mr. Bayer's opinion, this proposed development recognizes the steep slope characteristics of the site, shows sensitivity to that and creates the least possible disturbance to natural conditions. References to watercourses, marshes, swamps, etc., were not applicable to this site, nor were the various nuisance factors.

Policy 1P-1(c)(8) states:

> " That in addition to the public hearing requirements as set out in the Planning Act and City By-laws, all applications for amendments may be aired to the public via the 'voluntary' public hearing process established by City Council for the purpose of information exchange between the applicant and residents. This voluntary meeting allows the residents to clearly understand the proposal previous to the formal public hearing before City Council;"

Mr. Bayer explained that such meetings were no longer voluntary, and that such a meeting had been held.

Policy 1P-1(c)(9) states:

> " That in addition to the foregoing, all zoning amendments are prepared in sufficient detail to provide:
>
> i) Council with a clear indication of the nature of proposed development, and,
>
> ii) Permit staff to assess and determine the impact of such development would have on the land and the surrounding community."

Sufficient detail had been provided by the developer Mr. Bayer said, and when Council had requested additional information it had been provided. As well, staff was satisfied that it had had sufficient access to information to determine the impact of the proposed development.

In conclusion Mr. Bayer stated that in his opinion, the proposed development represented good planning, was consistent with the policies of the Municipal Planning Strategy and was worthy of Council's approval.

In cross-examination Mr. Bayer was asked to comment on Policy T-10 of the MPS which states:

> "It shall be the intention of City Council to undertake a design study to widen Braemar Drive and take into consideration the associated concerns of pedestrian movements and the protection of the lake."

Mr. Bayer acknowledged that senior staff in the Department of Transportation have agreed on a solution to the Braemar Drive "bottleneck" identified as being the area from Red Bridge Road to the Rotary but that cost sharing agreements were necessary to implement the improvement.

Asked if his recommendation of approval of the rezoning application was dependent on the buffering proposed for the development, Mr. Bayer responded that buffering was certainly important but was not the top priority. Mr. Bayer agreed that the developer would have no legal obligation to plant additional trees or retain existing trees on the site, but that the same conditions would apply if the proposed development were for single family homes instead of townhouses.

Mr. Stanley Gardiner, a professional engineer with CBCL Limited who has specialized in transportation engineering, gave evidence on slope profiles of existing and proposed roads in the area of the subject property, on actual and projected traffic counts in the area, and on details of the intersection of the proposed access road with Braemar Drive.

Mr. Gardiner commented on his scale drawings of longitudinal profiles of Maple drive from Fourth Street to Braemar Drive, of a hypothetical Walker Street extension intersecting with a potential north-south internal road on the subject site, and of a hypothetical Major Street extension leading to the potential north-south internal road. Maple Drive runs approximately east-west to the north of the subject site, intersecting with Braemar Drive which runs north-south. Walker Street is parallel to Maple Drive to the south and intersects with Fourth Street; and Major Street also runs east-west parallel to Walker Street to the south, ending at Fourth Street. These drawings which together with traffic count information were filed as Exhibit T-36, were all drawn in an exaggerated scale of 1 inch (horizontal) = 10 feet (Vertical), to show grades and slopes more clearly.

Mr. Gardiner pointed out that Maple Drive has a steep gradient of 14.5% down to Braemar Drive where there is no noticeable flat or stopping area and that between the top of the steep slope and Fourth Street sight distance is restricted by horizontal and vertical curves in the road. Mr. Gardiner stated that the profile of a projected Walker Street extension showed an equally steep slope of 14.5% and that the profile of a projected Major Street extension showed a 14% slope to Fourth Street, followed by an initial 9% slope as Major Street continued uphill from that intersection. The projections of either a Walker Street extension or a Major Street extension as access to the subject site contain slopes which are too steep in Mr. Gardiner's opinion.

Two scale drawings by Mr. Gardiner were filed as Exhibits. Exhibit T-37 shows "Proposed road/access, Lund Property, Braemar Drive" and Exhibit T-38 shows "Proposed road access, intersection detail, Lund property, Braemar Drive." With reference to Exhibit T-37 Mr. Gardiner explained that the maximum slope of the access road is 11% for 160 feet of its length with a 4% slope in the initial 40-65 feet from the intersection with Braemar Drive. He stated that the maximum grade occurs one-third of the way up the access road with the crest at approximately the three-quarter mark along the road. According to Mr. Gardiner the intersection of the access road and Braemar Drive had been designed for three different conditions: 1) Braemar Drive to continue to exist as currently, 2) Braemar Drive upgraded to 36 feet width, curb to curb (from existing 20 foot width), or 3) the Mic Mac Rotary improved.

With reference to Exhibit T-38 which illustrates detail of the intersection of the access road with Braemar Drive as it now exists or as improved, and with the proposed Mic Mac Rotary improvements, Mr. Gardiner stated that the existing bank along the east (uphill) side of Braemar, to the south of the access road intersection would be excavated to provide adequate sight lines at the proposed intersection. This cut in the existing bank would remove approximately 10,000 cubic yards of earth to a point 55 feet back from the edge of the road, for a distance of 420 - 430 feet. In Mr. Gardiner's opinion this improvement would result in a safe intersection.

Information contained in Exhibit T-36 shows that Braemar Drive in 1982 contributed the lowest number of vehicles per day to traffic at the Mic Mac Rotary, according to Department of Transportation figures. The average vehicles per day in 1982 contributed by Braemar Drive was 8,710, compared to 45,100 vehicles per day from Highway 111.

Mr. Gardiner estimated that the "trip generation" from the proposed development, calculated by using figures from a manual, would result in an average weekday total of 260 trips if the townhouse project were developed or 230 trips on an average weekday if the site were developed with 23 single family houses. Mr. Gardiner pointed out that by his calculations 50 townhouses would generate 15% more traffic than 23 single family homes. He estimated that this development would increase traffic on Braemar Drive by 3%.

In cross-examination Mr. Gardiner agreed that the slope of the access road to the proposed development was close to the maximum allowable grade which was not ideal but was "within tolerable standards". He also agreed that the sightline improvements could be done either by the developer or as part of the improvements to the Rotary, but that there was no definite prospect of improvements to the Rotary in the near future.

Counsel for City of Dartmouth called 3 persons to give evidence on traffic matters. Mr. Carl Whitman who resides at 1 Fourth Street works at 221 Waverley Road and so takes Fourth Street to Maple Drive and Maple Drive to Braemar, exiting to the right (north) on Braemar each morning on his way to work and reversing this route at night. He described the intersection of Maple Drive and Braemar Drive as very hazardous to approach because of the slope on Maple, its narrow width and wide ditches. He said that a left turn from Maple Drive to Braemar Drive was very difficult because of backed up southbound traffic which at times is quite fast moving.

Mr. William Stevens who has resided at 122 Braemar Drive for the past 11 years stated that he had noticed a 3 to 4-fold increase in traffic in the past few years. He described the difficulty of gaining access to Braemar southbound to the Rotary in the morning, often involving a 2 to 5 minute wait for access, and also the hazards of exiting off Braemar at the evening rush hours because of rapidly accelerating northbound traffic as it leaves the Rotary. Mr. Stevens lives 250 feet to the north of the proposed access road and felt such an access would be dangerous because of its closer proximity to the Rotary.

Constable David Porter of the Dartmouth Police Department is a member of the traffic division which investigates all accidents which are reported. It was his opinion that Braemar Drive was not equal to handling more traffic because of its narrow width and that even if the bank between the proposed access and the rotary were cut back, "we're still inviting accidents". He agreed that evening peak traffic northbound on Braemar accelerated rapidly, sometimes before actually leaving the Rotary. Constable Porter stated that there had been 6 accidents reported in this vicinity between February 11, 1983, and April 30, 1984.

Counsel for the City called Michael Turner, an accredited appraiser and consultant, to give evidence on the probable effect of the proposed townhouse development on adjacent properties. Mr. Turner stated that he had visited the site "cursorily" and had inspected it from the roadside for 3 hours that morning. Mr. Turner had assumed a $50,000.00 - $75,000.00 probable value for the proposed townhouses in his calculations of the effect they would have on adjacent single family homes. He concluded that because of topography there would be no effect on properties fronting on Fourth Street, (uphill and to the east of the subject property). He also felt that there would be no effect on properties fronting on Maple Drive (to the north) except for a marginal effect on Civic No. 18 Maple Drive which would have one townhouse within 25 feet of the rear yard boundary. Mr. Turner considered that there would be a marginal depreciation in market value (less than $2,000.00) on Civic Nos. 124 and 118 Braeside Drive and a $5,000.00 depreciation effect on Civic No.

122 and a $5,000.00 to $6,000.00 depreciation effect on Civic No. 130 Braemar Drive. Mr. Turner added that he felt that Civic No. 130 Braemar Drive would be helped in the re-alignment shown on Exhibit T-24 which showed quite a different layout of townhouses from an earlier plan which he had used to estimate the depreciation effect of the proposed townhouses on adjacent properties. Mr. Turner felt he would have to recheck his figures because of the changes shown on the more recent layout plan.

In cross-examination Mr. Turner stated that the relative market value of the townhouse units was not the dominant feature in their effect on the market values of surrounding properties but rather the juxtaposition of the townhouses in relation to the surrounding single family homes. Mr. Turner believed that single family residential development on the subject property would have a less "dominating" effect on adjacent properties because the density would be relatively less.

Mr. Robert Patterson, Chief of the Dartmouth Fire Department for 7 years stated that the cul de sac at the end of the proposed access road may not now be of sufficient diameter to allow firetrucks to turn, however he has the authority to ensure that the turning radius will meet the necessary minimum standards.

Mr. Peter Mettam, a qualified architect and a partner in Mettam & Wright Associates, who has been responsible for subdivision design and multi-facetted developments, gave evidence on the proposed townhouse development and the policies of the M.P.S. Mr. Mettan stated that the proposed design was commendable for a problematic site and that the direction chosen by the developer had been chosen with reasonable care. He felt however that the impact on Braemar Drive was still considerable because of the downward slope and the 3-storey exposure of the townhouses on that side of the subject property.

Specifically Mr. Mettam felt that the proposed townhouse development did not meet Policy 1P-1(c)(2) because the development was not compatible with the bulk and scale of the houses below on Braemar Drive. Also he felt that the proposed development did not comply with Policy 1P-1(4)(ix) because it would have a detrimental social effect, or with Policy 1P-1(6)(i) because of the density of the proposed use.

Mr. Mettam expressed the opinion that this area was a good example of suburban Dartmouth rather than urban Dartmouth. Mr. Mettam defined Dartmouth as being 70% suburban but agreed that he could not define the terms urban and suburban.

In Mr. Mettam's opinion, 23 single family houses would be more compatible with the existing development surrounding the subject property. He stated that the usual arrangement in mixed housing developments placed higher density residential uses on the outside and lower density uses in the interior of the property, however the proposed townhouse development would be the reverse of this principle. He felt that consequently the lower density residential development would take the brunt of the traffic. Mr. Mettan is aware of traffic problems because he lives 500 feet further away from the Rotary off the Waverley Road, which is an extension of Braemar Drive beyond Red Bridge Pond.

The following persons expressed their opinions of the proposed townhouse development: Mr. Donald Cashen, 46 Major Street; Mr. Carl Whitman, 1 Fourth Street; Mr. Jack Begin, 130 Braemar Drive; Mr. Frank Faggiani, 13 Maple Street; Mr. Ernest Lund, Truro; and Mr. Donald Eisener, 91 Braemar Drive.

Mr. Cashen who lives at the corner of Major Street and Fourth Street and is an abutting property owner, and Mr. Lund who spoke on behalf of his mother who has entered into an agreement of purchase and sale with the developer, both favoured the townhouse project. Mr. Cashen has experienced a number of break-ins over the past 6 years and expressed anxiety about trespassers who used the subject property for various illicit pastimes. The developer has an option with him to purchase a portion of his property for use as a pedestrian walkway to Fourth Street. Mr. Lund stated that his mother who was unable to attend the hearing has lived on Braemar Drive for 40 years and intends to continue to do so, that she had offered the subject property to the City as a park a few years ago and that she approves of the proposed development. Mr. Lund calculated that of the 5.5 acres of the subject property the townhouses would cover 2.8 acres, the access road and cul de sac 1 acre and the remaining 1.7 acres or 44% of the property would be buffer.

Mr. Whitman who would abut the north side of the proposed walkway to Fourth Street expressed anxiety about the maintenance difficulties and expense of such a walkway because of the steep slope and prevailing winter winds which he felt would cause snow drifts. Mr. Begin and Mr. Faggiani were both primarily concerned with possible depreciation of their property and in addition Mr. Begin was unhappy with the possibility of a rear view from his property of "wall to wall housing". Mr. Eisener was primarily concerned with traffic problems on Braemar Drive.

In an appeal such as this, pursuant to Section 63(1) of the Planning Act:

> "(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
>
> (4) The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision

> of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

> In addition, Section 63(7) states:

> "(7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

Although Section 63(7)(a) was cited in the grounds of appeal, the Board heard little direct evidence on this subject. The Appellant's post-hearing brief refers to its costs necessitated by an appeal to this Board. In the opinion of the Board the Appellant did not make an effective case that the financial cost of an appeal to this Board from Council's refusal to rezone the subject property was an "undue hardship".

Counsel for the Respondent the City of Dartmouth state in their post-hearing submission that "the onus is on the Appellant to prove that the decision of council not to rezone the land cannot reasonably be said to carry out the intent of the municipal planning strategy..". It continues:

> "It is the submission of the City that the Appellant has not discharged the onus, and that the rezoning of the lands for TH development would clearly be contrary to the M.P.S. The City submits that it is not necessary that it demonstrate that there are no provisions of the M.P.S. which are consistent with the proposed Land-Use By-law amendment. The City need only demonstrate that development which might result from the rezoning would be contrary to the best

> interests of the City as expressed in the M.P.S."

And further the brief states:

> "It is submitted that City Council considered various requirements of the M.P.S., and based its decision reasonably upon those requirements. The issue is not a question of balancing whether there are more provisions of the M.P.S. which are consistent with the proposed change than there are provisions which are not. If the M.P.S. contains any provisions which will be inconsistent with the proposed Land-Use By-law Amendment, then the decision of Council should be upheld."

The Board agrees with Counsel for the City that the provisions of the M.P.S. most relevant to this appeal are transportation policy T-10 which concerns Braemar Drive from Red Bridge Pond to the Mic Mac Rotary, and the criteria for re-zoning outlined in the implementation section of the M.P.S.

Mr. Donald Bayer, Director of Planning for the City, reviewed those policies in detail and concluded that the proposed re-zoning was consistent with the policies of the M.P.S., represented good planning, and was worthy of Council's approval. The only witness who gave evidence for the City on policies of the M.P.S. was an architect, not a qualified planner, who stated that the proposed development for which rezoning was sought was not in accord with 3 policies, namely: Policy 1P-1(c)(2), 1P-1(c)(4)(ix), and 1P-1(c)(6)(i).

Policy 1P-1(c)(2) states:

> "That the proposal is compatible and consistent with adjacent uses and

> the existing development form in
> the area in terms of use, bulk and
> scale of the proposal."

Mr. Mettam felt specifically that the bulk and scale of the proposed development was not compatible with the homes below the subject property on Braemar Drive. He agreed that single family houses would have the same elevation but not the same length (approximately 50 feet for a single family house in comparison to approximately 160 feet for the longest of the proposed groupings of townhouses). The Board believes that any residential development on the subject property would affect at least some of the homes on Braemar Drive because of the height differential. In the opinion of the Board the proposal of the developer recognizes this problem and deals with it as effectively as possible.

Policy 1P-1(c)(4)(ix) states:

> "The detrimental economic or social effect
> that it may have on other areas of the
> City."

Mr. Mettam felt that the proposed development would have a detrimental social effect on the adjacent area. The policy however refers to economic or social effects on "other areas of the City". In the opinion of the Board the immediate neighbourhood is not the affected area to which this policy applies. It was not clear, in any case, what the detrimental social effect predicted by Mr. Mettam would be.

Policy 1P-1(c)(6)(i) states:

"Type of use, density and phasing".

This policy refers to controls to ensure compliance with approved plans. Mr. Mettam expressed specific reservations about the control of density of the proposed townhouses. Townhousing (TH) Zone allows a density of 15 persons per acre. The developer's proposal would produce 9.5 persons per acre. The TH Zone would allow 82 units to be built on the subject property: the developer's proposal is to build 50 units.

The Board acknowledges that the density of development on this site is a legitimate concern. The Director of Planning for the City, however, stated that the existing TH Zone restrictions together with the difficulties of the site would be sufficient limitations to ensure good development. The Board, having visited the site, accepts his expert opinion in this matter. Mr. Mettam's statement that the developer's architect had achieved "the maximum number of units so that the per-dollar cost of the house is kept to the minimum" seems to acknowledge that the theoretical maximum number of townhouses allowable on the subject property could not be achieved because of its shape and topography.

The Board heard much evidence about traffic problems - past, present and future - in connection with the subject property. In the opinion of the Board the developer's proposed access road compares favourably with Maple Drive, the nearest street intersecting with Braemar Drive, in the matter of maximum slope and of the slope of the stopping space at the point of intersection. Any development on the subject property would contribute additional traffic to Braemar Drive, and the evidence was convincing that Braemar Drive is in need of improvement. According to Mr. Mettam, however, traffic generated by the proposed townhouses would not to any significant degree affect the current traffic situation for the existing development in the area. The evidence of the traffic engineer, Mr. Gardiner, supported this conclusion. A much more significant contributor to traffic flows on Braemar Drive, alluded to by Mr. Mettam, appears to be the rapidly developing Montebello Estates just north of the Red Bridge Pond which he said had grown by approximately 100 single family homes in the past year. At any rate, the Board accepts the recommendations of Mr. Bayer, the traffic management group, the Department of Transportation and Mr. Mettam that the development "is not premature or inappropriate" for traffic or transportation reasons.

In conclusion, the Board does not accept the opinion of Counsel for the City that "if the M.P.S. contains any provisions which would be inconsistent with the proposed Land-Use By-law Amendment, then the decision of Council should be upheld." The Board is required to determine whether the decision of Council "reasonably" carries out the intent of the Municipal Planning Strategy. Having considered the evidence adduced at the hearing and the comprehensive briefs submitted by Counsel, and having visited the site and surrounding area, the Board concludes that the decision of Council to refuse to rezone the subject property from Single Family Residential (R-1) Zone to Townhousing (TH) Zone does not reasonably carry out the intent of the Municipal Planning Strategy. The Board allows the appeal by instructing the Council to amend the Land-Use By-law to rezone the subject property from Single Family Residential (R-1) Zone to Townhousing (TH) Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 20th day of June, A.D., 1985.

E A Lawrence
ELIZABETH LAWRENCE

Vice-Chairman, Nova Scotia
Municipal Board.

Robb v. County of Halifax

PLANNING--CONTRACT ZONING--DEVELOPMENT AGREEMENT--COMPREHENSIVE DEVELOPMENT DISTRICT--APPROVAL TO PERMIT ROW HOUSES, CHURCH AND SHOPPING CENTRE--FAILURE TO GIVE NOTICE OF HEARING AS DIRECTED BY BOARD--CONSISTENCY WITH INTENT OF M.P.S.--PLANNING ACT, SS. 23, 55, 56, 71(1),(3),(4)--MUNICIPAL BOARD RULES OF PRACTICE AND PROCEDURE, SS. 8(1),(3)--COLE HARBOUR/WESTPHAL M.P.S. POLICIES P-46, P-47, P-49, P-50, P-51, P-58, P-59, P-93

This is an appeal by K.R. as an aggrieved person from a decision of the Council of the Municipality of the County of Halifax approving a development agreement with C.D.L. to permit the construction of row houses, a church and a shopping centre. The subject property contains approx. 67,513.9 sq. metres and is at the intersection of the Cole Harbour Road and Caldwell Road in the County of Halifax. The site is established as a comprehensive development district under the Cole Harbour/Westphal Municipal Planning Strategy (M.P.S.). Part of the property is designated Community Commercial on the M.P.S.'s Generalized Future Land-Use Map and part is designated Residential "A". The development is to take place in 2-phases, with the first involving the construction of 12 row houses and a church on the Residential "A" lands and the second phase involving a shopping centre, consisting of two buildings with 144,500 sq. ft. on the ground floor and 10,000 sq. ft. of office space on the second floor, within the area designated Community Commercial.

HELD: The Board confirms the decision of Council.

The Appellant failed to give notice of the hearing to the assessed owners and others as directed by the Board. This did not deprive the Board of jurisdiction to hear the merits of the appeal. The Board issued new instructions concerning notice and these were complied with.

The issue to be determined by the Board in an appeal pursuant to s.71(1) of the Planning Act is identified in s.71(3) as whether the proposed agreement is consistent with the intent of the M.P.S. There is an onus on the Appellant to show the proposed agreement is not consistent with that intent, and the Appellant has not discharged that onus. The Appellant's objections to what he terms an "abrupt" change in the R-1 zoning of the site and to the designation of part of the site as Community Commercial are not issues in this appeal. The Appellant did have an opportunity, which he made use of, to have input into the planning process for this site. The concerns raised by the Appellant relating to traffic and sewer and water facilities are adequately addressed in the development agreement. The proposed agreement is consistent with the intent of the M.P.S.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, c. 9, Statutes of Nova Scotia, 1983;

- and -

IN THE MATTER OF: An Appeal by **KEN ROBB** from the decision of the Council of the Municipality of the County of Halifax, made April 3, 1985, which approved a contract development with Clayton Developments Limited, in Cole Harbour, Halifax County.

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: KEN ROBB, on his own behalf without Counsel;

PETER McDONOUGH, Q.C., and SCOTT NORTON, LL.B., for the Applicant, Clayton Developments Limited;

LYNN HENRY, LL.B., for the Municipality of the County of Halifax.

DECISION

This is an appeal under Section 71(1) of the Planning Act, Statutes of Nova Scotia, 1983, by **KEN ROBB**, 10 Caldwell Road, in the City of Dartmouth, Nova Scotia, as an aggrieved person from the decision of the Council of the Municipality of the County of Halifax made April 30, 1985, approving a development agreement with Clayton Developments Limited, hereinafter referred to as the "Developer", to permit the construction of row houses, a church and a shopping centre on lands located on the southern side of the Cole Harbour Road, at its juncture with the eastern side of the Caldwell Road.

The Notice of Appeal, dated May 20, 1985, was received by the Board on May 21, 1985, and sets forth the following grounds for the appeal:

> "1. the decision of council is not consistent with the intent of the municipal planning strategy;
>
> 2. the decision is in violation of the policies, goals, objectives, and regulations of the Municipal Development Plan.
>
> 2(a). abrupt change from R-1 to Commercial;
>
> 3. the decision was made without proper notice given to the appellant."

The Board set down the appeal for hearing on July 3, 1985, and by letter dated June 7, 1985, instructed the Appellant to serve by ordinary, prepaid mail, at least two weeks prior to July 3, 1985, a copy of the Notice of Hearing on the following persons:

> "Ronald Simpson, Provincial Director of Planning;
>
> J.G. Kelly, Clerk of the Municipality of the County of Halifax;
>
> Robert Cragg, Solicitor for the Municipality of the County of Halifax;
>
> Peter McDonough, Q.C., Solicitor for the Developer; and
>
> All the assessed owners of land within a distance of 500 feet of the subject site."

At the commencement of the hearing on July 3, 1985, the Appellant stated that he had not complied with the Board's letter of instruction dated June 7, 1985, because there were in excess of 200 assessed owners of land within a distance of 500 feet of the subject site and it was impossible to determine who these owners were and then mail each of them a copy of the Notice of Hearing within the time frame set out in the Board's letter. The Appellant said he did not serve any of the persons named in the Board's letter of June 7, 1985, because he thought it was the Board's duty to notify these persons.

Counsel for the Developer made a motion for the dismissal of the Appeal on the grounds that the Board lacked jurisdiction to proceed with the Appeal because the Board's instructions as to service of the Notice of Hearing were not carried out and therefore the Appellant had failed to comply with the mandatory requirements of subsection 8(1) and 8(3) of the Rules of Practice and Procedure of the Board made pursuant to Section 23 of the Planning Act.

The Board disagreed with the submission of Cousel for the Developer that the Board's directions as to service of the Notice of Hearing are mandatory requirements and the failure to follow the instructions is fatal to the Appellant's right to be heard on the merits of the case.

This same issue was considered by the Board in an appeal by the Town of North Sydney, Vol. 2 of the Municipal Board Decisions, Page 622 at pages 627 and 628. The Chairman of the Board in discussing the effect of disregarding procedural requirements quoted the following passage from de Smith's text entitled "Judicial Review of Administrative Action", 4th ed. page 142:

> "The law relating to the effect of failure to comply with procedural requirements resembles an inextricable tangle of loose ends. Although it would be futile to

attempt to unravel or cut all the knots, it is possible to state the main principles of interpretation that the courts have followed and to illustrate their application in a few settings.

When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be 'substantial compliance' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act.' In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and usual consequence of disobedience', breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the

> court is for any reason disinclined to interfere with the act or decision that is impugned."

The Chairman held in that appeal that the letter of instruction to Counsel for the Appellant concerning service of the Notice of Hearing was directory and not mandatory.

In the present appeal, the Board accepts the evidence of the Appellant that due to the large number of assessed owners of property within 500 feet of the subject property, there was insufficient time to carry out the instructions contained in the Board's letter of June 7, 1985. The four persons designated to be served with a copy of the Notice of Hearing received a copy of the Board's letter of June 7, 1985, and therefore were aware of the scheduled date of the hearing and not prejudiced by the failure to be served with a copy of the Notice of Hearing.

In the opinion of the Board, It did not lose jurisdiction to hear the merits of the appeal because of the non-compliance by the Appellant with the Board's letter of instruction of June 7, 1985. To ensure residents in the area were adequately informed of the hearing, the Board adjourned the hearing to July 24, 1985, and directed the Appellant to serve a copy of the Notice of Hearing by hand mail on the owners of property within 500 feet of the subject site, one week before the new hearing date.

The Board also directed the Appellant to serve the four persons named in it's letter of June 7, 1985, as well as the Minister of Municipal Affairs with a copy of the Notice of Hearing by prepaid mail at least ten days before the date of the new hearing.

At the commencement of the hearing on July 24, 1985, the Appellant filed an Affidavit stating that he had complied with the Board's instructions as to service of the Notice of Hearing. The Board then proceeded to hear the merits of the appeal.

The subject property is located on the southern side of the Cole Harbour Road where it intersects with the eastern side of Caldwell Road, in Cole Harbour, Halifax County. The site contains approximately 67,513.9 square meters and is shown as Block DG on a plan of survey prepared by Granville Leopold, N.S.L.S. The site is bounded on the north by Cole Harbour Road, on the west by Caldwell Road, on the South by a street known as Hampton Green as well as residential property already developed on Hampton Green and on the east by undeveloped land and residential land. A very small part of the property, triangular in shape, at the intersection formed by the Cole Harbour Road and the Caldwell Road is located in the City of Dartmouth and is not part of the subject site for purposes of this appeal.

Part of the subject property which abuts the Cole Harbour Road and Caldwell Road is designated Community Commercial on the Cole Harbour - Westphal Generalized Future Land-Use Map and part of the subject property which abuts Caldwell Road and Hampton Green is designated Residential "A". Under Schedule "C" of the Land-Use By-law, the site has been established as a comprehensive development district.

Section 56 of the Planning Act which provides for the establishment of a comprehensive development district reads as follows:

> "1. Policies adopted by a council pursuant to clause (p) of subsection (2) of Section 38 to provide for the establishment of a comprehensive development district shall identify matters that the council shall consider prior to the approval of an agreement for the development of the comprehensive development district and shall provide for the classifications of uses that are to be considered for a comprehensive development district or districts.
>
> 2. Where policies have been adopted pursuant to subsection (1), the land-use by-law may designate an area or areas as a comprehensive development district.
>
> 3. No development shall be undertaken in a comprehensive development district unless there is an agreement between the owner of the property and the council, but more than one owner of property in the comprehensive development district may be a party to the agreement.
>
> 4. A municipal development permit shall not be granted for any development in the comprehensive development district unless the development is consistent with the agreement entered into in subsection (1), and a municipal development permit may be granted to a person other than the person who signed the agreement."

This appeal is taken pursuant to Section 71(1)(a) of the Planning Act which reads as follows:

> "Where a council has approved the entering into of an agreement pursuant to Section 55 or 56, the decision of the council may be appealed by
>
> (a) an aggrieved person;"

Certified copies of the Cole Harbour/Westphal Municipal Planning Strategy and Land-Use By-law were filed as Exhibit

R-4 and R-5 Respectively.

The relevant policies of the Municipal Planning Strategy include the following: Policies P-46 and P-47 which provide for the establishment of a comprehensive development district and for development by agreement within these districts.

> "P-46 It shall be the intention of Council to establish a comprehensive development district within the zoning by-law which permits any residential use and the development of local commercial and community facility uses when in association with residential uses. Industrial and general commercial uses shall specifically be prohibited.
>
> P-47 Pursuant to Policy P-46, and as provided for by Sections 33(2)(c) and 34 of the Planning Act, the development of any district shall only be considered by Council through a development agreement or agreements which shall specify:
>
> i) the types of land uses to be included in the development;
>
> ii) the general phasing of the development relative to the distribution of specific housing types or other uses;
>
> iii) the distribution and function of proposed public lands;
>
> iv) any specific land use elements which characterize the development;
>
> v) matters relating to the provisions of central sewer and water services to the development;
>
> vi) provisions made for the proper handling of storm water and general drainage within and from the development; and
>
> vii) any other matter relating to the development's impact upon surrounding uses or upon the general community, as contained in Policy P-94.
>
> In addition to (1) through (vii) other matters

> related to the provisions of central services and the proper handling of stormwater and general drainage matters shall additionally be considered by Council in accordance with the provisions of Sections 33(2)(c) and 34 of the Planning Act."

Policies P-49, P-50 and P-51 which refer to the establishment of a community commercial designation and the type of uses permitted within this designated area:

> "P-49 It shall be the intention of Council to encourage the growth of commercial and community developments which serve the local area and create a community focus, by establishing the Community Commercial Designation as shown on the Generalized Future Land Use Map (Map 1).
>
> P-50 Within the Community Commercial Designation, it shall be the intention of Council to establish a commercial zone which permits commercial retail, services and office uses as well as higher density residential uses and community and institutional facilities. General commercial uses shall be limited to a maximum of ten thousand (10,000) square feet of floor area.
>
> P-51 Notwithstanding Policy P-50 and with reference to Policy P-57, within the Community Commercial Designation Council may consider commercial retail services and office uses in excess of ten thousand (10,000) square feet to a maximum of twenty thousand (20,000) square feet, according to the provisions of Sections 33(2)(b) and 34 of the Planning Act. In considering such developments, Council shall have regard to the provisions of Policy P-93 and to the maintenance of a buffered separation from abutting residential areas, the location of access, loading and parking areas as well as landscaping and overall design."

Policies P-58 and P-59 which deal with comprehensive commercial developments:

> "P-58 Notwithstanding Policy P-46, where any comprehensive development district abuts a Community Commercial Designation or a Highway Commercial Designation, such district

> may be extended into the Commercial Designation for the purposes of developments which are larger than those permitted or which require a more flexible approach than that provided for in the zoning by-law. Furthermore, it shall be Council's intention that the types of commercial uses within such a comprehensive development district shall be in conformity with the provisions of the appropriate commercial designations. When considering an amendment to the zoning by-law to establish such a district, Council shall have regard to the following:
>
> i) that the commercial portion of the development shall be contained within the Commercial Designation;
>
> ii) that the total development shall have a minimum of five (5) acres; and
>
> iii) that the appropriate provisions of Policy P-46 shall apply.
>
> P-59 Pursuant to Policy P-58, amendments to the zoning by-law shall specify the types of land use to be included in the development according to the provisions of Policy P-47. Further, any development agreement as provided for under Sections 33(2)(c) and 34 of the Planning Act shall specifically provide that the residential portion of any development shall be the first phase of the development."

Policy P-93 which sets out the criteria to be considered by Council in evaluating the proposed development agreement:

> " In considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:
>
> i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations;
>
> ii) that the proposal is not premature or inappropriate by reason of:
>
> > a) the financial capability of the

Municipality to absorb any costs relating to the development;

b) the adequacy of sewer and water services;

c) the adequacy or proximity of school, recreation and other community facilities;

d) the adequacy of road networks leading or adjacent to or within the development; and

e) the potential for damage to or destruction of designated historic buildings and sites.

iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

a) type of use;

b) height, bulk and lot coverage of any proposed building;

c) traffic generation, access to and egress from the site, and parking;

d) open storage;

e) signs; and

f) any other relevant matter of planning concern.

iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

Sections 33(2)(c) and 34 of the Planning Act referred to in the above policies referred to Sections in the former Planning Act, c. 16, Statutes of Nova Scotia, 1969, as amended, which has been repealed. The above sections now appear as Sections 55 and 56 of the present Planning Act, c. 9, S.N.S. 1983.

The relevant portion of the Land-use By-law is Part 23 which reads as follows:

> "CDD (COMPREHENSIVE DEVELOPMENT DISTRICT)
>
> 23.1 CDD USES PERMITTED
>
> No development permit shall be issued in any CDD (Comprehensive Development District) except for residential uses, or local commercial uses, community facilities and/or parks in association with residential uses, which comprise a comprehensive development of five (5) or more acres (2 Hectares). Major commercial uses and general industrial uses are specifically prohibited within any CDD, except according to Policies P-46 and 47, and Policies P-58 and P-59 of the Municipal Development Plan for Cole Harbour/Westphal.
>
> 23.2 CDD REQUIREMENTS
>
> In any CDD (Comprehensive Development District) no development permit shall be issued except in conformity with Sections 33(2)(c) and 34 of the Planning Act."

The Development Agreement provides for a 2-phase development of the site. Phase 1 involves the construction of 12 row houses on Hampton Green and a Church near the corner of Hampton Green and Caldwell Road. Phase 2 involves the construction of a shopping centre consisting of two buildings containing 144,500 square feet on the ground floor and 10,000 square feet of office space on the second floor. Phase 1 of the development will be within the area designated Residential "A" on the Generalized Future Land-Use Map while Phase 2 will be within the area designated Community Commercial.

A Staff Report dated April 2, 1985, recommended approval of the development agreement. A copy of the Staff Report to Council was introduced as part of Exhibit R-3 and it reads as follows:

"RECOMMENDATION

THAT THE REQUEST OF CLAYTON DEVELOPMENTS LIMITED TO ENTER INTO A DEVELOPMENT AGREEMENT WITH THE MUNICIPALITY FOR THE CONSTRUCTION OF A COMPREHENSIVE DEVELOPMENT CONSISTING OF ROWHOUSES, A CHURCH AND A SHOPPING CENTRE WITHIN A COMPREHENSIVE DEVELOPMENT DISTRICT AT THE CORNER OF COLE HARBOUR ROAD AND CALDWELL ROAD BE APPROVED.

GENERAL INFORMATION

On April 16, 1984 Council approved amendments to both the municipal development plan and land use by-law for Cole Harbour/Westphal with resepct to lands owned by Clayton Developments Limited at the intersection of Cole Harbour and Caldwell Roads in Cole Harbour.

The effect of the amendments was to extend the Community Commercial Designation and to encompass the vacant lands of Clayton Developments Limited within a Comprehensive Development District (CDD).

Within any CDD the issuance of development permits is subject to the successful negotiation of a development agreement and permits are only issued in conformity with the terms of the effective agreement.

At the request of Clayton Developments Limited, the Developer and Municipal staff, pursuant to the CDD requirements and the policies of the planning strategy have negotiated the attached agreement.

SYNOPSIS

The agreement provides for the development of two phases. Phase 1 will be within the Residential "A" Designation and Phase II within the Community Commercial Designation.

Site preparation and construction will commence concurrently, although the residential/landscaping portion of the first phase will be completed before the commercial developoment.

Phase 1 consists of rowhouses, a church and

> open space. The rowhouses will be constructed in three separate blocks of four units each. All twelve units will be sited along Hampton Green. The church will be located near the corner of Hampton Green and Caldwell Road. Access to the church site will be from Caldwell Road only.
>
> Substantial landscaping requirements within Phase 1 and at the rear of Phase II development together with the buildings are intended to provide a substantial buffer between the existing residential areas and the commercial component contained in Phase II.
>
> Phase II consists of a shopping centre consisting of two buildings. The completed development will contain 144,500 square feet on the ground floor, with an additional 10,000 square feet of space for office/services on a second floor. Access will be from Cole Harbour Road and parking will be provided for more than 700 vehicles.
>
> Landscaping is required along both Caldwell Road and Cole Harbour Road as well as to the rear of the centre. Facial wall signs will be placed on the building sides facing Cole Harbour Road and only two free standing signs are to be built.
>
> It is anticipated that the development of this site in conformity with the attached development agreement will provide the intended buffering and separation between the existing residential area and the new commercial development.
>
> ADDENDUM
>
> Planning Advisory Committee has recommended that Part 3.1 of the attached Agreement be altered to permit limited outdoor display."

A copy of the proposed development agreement was also introduced as part of Exhibit R-3.

Mr. Robb gave evidence on his own behalf. The Municipality and the Developer did not call any witnesses. At the request of the Board, Valerie Spencer, Manager of the

Policy Division of the Planning Department of the Municipality of the County of Halifax, was examined by Council for the Developer. Stratton MacDonald, a resident of Caldwell Road, made a submission to the Board.

Mr. Robb is a Nova Scotia Land Surveyor who has resided in the Cole Harbour area for the last 28 years. He carries on a surveying business from his home on Caldwell Road. His property is located on the west side of Caldwell Road, near the intersection of Cole Harbour Road and Caldwell Road and directly opposite that part of the subject site which is proposed to be developed with a shopping centre.

According to Mr. Robb, except for the area proposed to be developed as a shopping centre, Caldwell Road is 98% developed with residential properties. Prior to the adoption of the Municipal Planning Strategy and Zoning By-law in 1982, the area was zoned R-1. Mr. Robb stated that when the Developer acquired the subject site, it was zoned R-1 and the developer indicated that the site would be developed with residential units. In Mr. Robb's view the prior R-1 zoning should be respected.

Mr. Robb said that he has no objection to the Church or Row House development but he objects to the shopping centre development. He also objects to the abrupt change in the zoning of the site from residential to commercial.

Mr. Robb stated that if the shopping centre is allowed to proceed, his property and his neighbours' properties will be devalued. He also feels that if the developer is allowed a commercial zone for its site, his property should be zoned commercial.

Mr. Robb further objected to the fact that there was no opportunity to protest the adoption of the Cole Harbour-Westphal Municipal Planning Strategy in 1982 or the change in the Municipal Planning Strategy in 1984 which affected the subject site. He also objected to the fact that the County of Halifax did not provide an opportunity to the public to get involved in the development agreement process between Clayton Developments Limited and the County when the developer was negotiating a proposed agreement with staff prior to submission to Council.

Mr. Robb stated that the development of a shopping centre on the subject site will aggravate the existing traffic problem on Caldwell Road by drawing new traffic to the area. He points out that the shopping centre has parking for 700 vehicles and that recent improvements to the intersection at Cole Harbour Road and Caldwell Road are not adequate to improve the existing traffic congestion.

Mr. Robb was also concerned that a brook located on the site would disappear because the developer planned to insall a 6" storm sewer in the brook and then cover the brook over with pavement. He suggested that the brook remain open and that other means be found to handle the storm sewer run-off.

Mr. Robb also said that the existing sanitary sewer system is not adequate to accommodate the proposed development.

Finally Mr. Robb noted that Cole Harbour already has two shopping centres and there is a regional shopping centre nearby in the City of Dartmouth and the area does not need another shopping centre.

Mr. Robb suggested that the subject site should revert to its previous R-1 zoning. Alternatively, he suggests a 300' set-back from Cole Harbour Road and Caldwell Road for commercial development. He also suggests that a solution to the problem at traffic at the intersection of Cole Harbour Road and Caldwell Road be found before proceeding with a development of this magnitude.

When questioned by Counsel for the Developer, Mr. Robb could not point out any part of the proposed agreement which conflicted with the intent of the Municipal Planning Strategy.

Valerie Spencer is the Director of the Policy Division of the Planning Department of the Municipality of the County of Halifax. She is a qualified land-use planner. Ms. Spencer said that when the Cole Harbour/Westphal Municipal Development Plan and Zoning By-law were adopted in 1982, part of the subject site was designated Community Commercial and part was designated Residential "A" on the Generalized Future Land-Use Map. That part of the site abutting Cole Harbour Road and Caldwell Road was zoned C-2 and that part of the site abutting Hampton Green and Caldwell Road was zoned R-1. Approximately 4 acres of the site abutting Cole Harbour Road and Caldwell Road was designated Residential "A" but zoned Commercial (C-2).

In 1984, at the request of the Developer, the Municipality of the County of Halifax amended its Municipal Planning Strategy (formerly Municipal Development Plan) and Land-use By-law (formerly known as the Zoning By-law) by extending the Community Commercial designation to the land along Cole Harbour Road and Caldwell Road which had previously been designated Residential "A"; removed the R-1 and C-2 Zones on the site and established a comprehensive development district on the site necessitating a development agreement between the landowners and the Municipality before development could take place.

Ms. Spencer said that after a year of very difficult negotiations, a proposed agreement was negotiated and placed before Council for approval. Council approved the agreement on April 30, 1985.

Ms. Spencer reviewed the proposed agreement and how in her opinion it met the intent of the Municipal Planning Strategy. She stated that the development will proceed in two phases with the residential phase being developed first and the commercial phase being developed second. She further stated that the commercial portion of the development will be located within the area of the site designated Community Commercial and that Part 3, Section 3.1, of the proposed agreement limits the allowable commercial uses to those uses permitted by the Municipal Planning Strategy.

She also pointed out that the Municipal Planning Strategy is concerned with access to the site, parking, separation between commercial and Residential developments and the adequacy of services.

Ms. Spencer stated that the proposed agreement deals with these concerns by limiting access to the shopping centre to two entrances which are located on the Cole Harbour Road. There is no access to the shopping centre from Caldwell Road. Adequate parking is provided on the site and the parking aisles have been designed for the easy movement of vehicles on the site. Part 3, Section 3.7, of the agreement requires extensive landscaping for the commercial part of the development along Cole Harbour Road and Caldwell Road and to the rear of the shopping centre to ensure adequate buffering between existing residential areas and the commercial part of the development. Part 3, Section 3.4 of the agreement limits the maximum height of the building housing the shopping centre to 35 feet and Section 3.6 ensures that signs and lighting comply with the Land-Use By-law. In addition she said that Part 4, Section 4.1, requires the water distribution facilities and storm and sanitary sewage facilities to be designed in accordance with the requirements of Municipal and Provincial specification for these types of facilities. Also Part 5, Section 5.2, binds the developer to conform with all the applicable by-laws and regulations of the Municipality and statutes and regulations of the Province. Ms. Spencer also noted that the manner in which the brook is to be used for storm drainage has been approved by the Department of Environment, Province of Nova Scotia.

In Ms. Spencer's opinion the development agreement conforms with the intent of the Municipal Planning Strategy.

Mr. Stratton MacDonald made a submission to the Board.

Mr. MacDonald resides at 74 Caldwell Road, Cole Harbour, Halifax County. He said that he came to the hearing because he received a copy of the Notice of Hearing in his mail box. He did not attend any of the previous public hearings with respect to the proposed project. He objects to the development of a shopping centre at the intersection of the Cole Harbour Road and Caldwell Road because it will increase traffic in the area. Also he said that a shopping centre will not add to the aesthetics of the area which is mainly developed residential. He further was concerned that the level of noise in the neighbourhood would be increased as a result of the development of a shopping centre. Mr. MacDonald was not aware that the previous zoning of that part of the subject site which is to be developed with the shopping centre was Commercial.

Section 71(3) of the Planning Act identifies the issue to be determined by the Board in an appeal pursuant to Section 71(1) and it reads as follows:

> "(3) The Board shall determine whether the proposed agreement is consistent with the intent of the municipal planning strategy."

In the opinion of the Board, there is an onus on the Appellant to show that the proposed agreement is not consistent with the intent with the Municipal Planning Strategy. It is the Board's opinion that the Appellant has not discharged that onus.

The objection by the Appellant to what he terms an "abrupt" change in the R-1 zoning of the site is not an issue that this Board can deal with on this appeal. Also the change in the designation of part of the site from Residential "A" to Community Commercial is not an issue in this appeal. With the adoption of the Cole Harbour/Westphal Municipal Development Plan and Zoning By-law in 1982 approximately 4 acres of the site located opposite the Appellant's property was zoned commercial (C-2). The entire site, including the 4 acre parcel zoned C-2, was established as a comprehensive development district in April, 1984. It appears that the Appellant thought that he was appealing at least in part, the Commercial (C-2) Zone applied in 1982 or the application of a comprehensive development district to the site in 1984. The issue to be considered in this appeal is not the zoning of the site but the implementation of a development agreement in relation to the subject site.

The Board also disagrees with the Appellant that he was not given an opportunity to have input into the planning process for this site. The evidence indicates that he attended public hearings and expressed his views during the time when a municipal development plan was being formulated for the Cole Harbour/Westphal area and at public hearings called to consider the application of a comprehensive development district to the site and the implementation of the development agreement.

The Appellant did raise certain concerns relating to traffic problems at the intersection of Cole Harbour Road and Caldwell Road, that he said will be aggravated by the development, and the lack of adequate sewer and water facilities to service the proposed development. In the opinion of the Board, the development agreement adequately addresses these concerns. In preparing a proposed agreement to submit to Council, planning staff obtained the comments and recommendations of traffic engineers with the Department of Transportation, staff of the Department of Environment of the Province of Nova Scotia on the realignment of the brook and staff of the Department of Engineering and Works of the Municipality concerning the adequacy of water and sewer facilities. The development agreement has addressed traffic concerns by limiting the location and the number of access points to the site. Part 4 of the agreement requires that the design and specifications of the water distribution facilities and storm and sanitary sewage facilities be provided to the Municipality before proceeding with the development and that they comply with established municipal and Provincial design and specification criteria for these types of facilities.

The powers of the Board relating to this appeal are set out in Section 71(4) of the Planning Act, c. 9, Statutes of Nova Scotia 1983 as follows:

> "The Board shall
>
> a) confirm the decision of the council;
>
> b) make any decision the council could have made; or
>
> c) refer the matter back to the council for further consideration."

The Board, after considering the evidence adduced at the hearing, having examined the Municipal Planning Strategy and Land-Use By-law, having viewed the subject site and surrounding area and having considered the argument of Counsel is satisfied that the proposed agreement is consistent with the intent of the Municipal Planning Strategy.

For the reasons stated, the Board confirms the decision of Council and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 13th day of August, A.D., 1985.

Darryl Wilson

DARRYL W. WILSON, Member.

NOVA SCOTIA MUNICIPAL BOARD.

Benedict v. Town of Truro

PLANNING--ZONING AMENDMENT--R-2 AND R-6 TO R-3 TO ALLOW APARTMENTS--"AGGRIEVED PERSON"--UNDUE HARDSHIP--REASONABLY CARRIES OUT INTENT OF M.P.S.--WHETHER TWO OR MORE HECTARES INVOLVED--FAILURE TO CONSIDER POLICIES--EFFECT OF POLICIES BEING CONSIDERED BY TOWN PLANNER AND NOT BY COUNCIL--PLANNING ACT, SS.63(1),(2),(3),(5),(7), 71(3),(5)--TOWN OF TRURO M.P.S. SUBPARTS 4, 4.1 POLICIES 201, 202, 205, 208, 211, 212, 263, 501, 502, 503, 504, 505, 506

This is an appeal by D.B. as an aggrieved person from a decision of the Council of the Town of Truro rezoning two parcels of land, one of approx. 1 acre zoned R-2 (Residential Double Family) and the second, across the street from the first, of approx. 4 acres zoned R-6 (Residential Rural), to R-3 (Residential Medium Density) to allow apartment units. The Town has a Municipal Planning Strategy (M.P.S.).

HELD: The appeal is allowed and the decision of Council reversed.

The Appellant is an "aggrieved person." He is a landowner in close proximity to the smaller parcel of land and lives in a community in close proximity to all the land being rezoned. On evidence before the Board, the decision would affect adversely the value of his interest in land or would be perceived by the Appellant and many others to do so. The Appellant is a person "whose pecuniary interest is directly affected...." Because the Appellant is not the applicant within the meaning of s.63(7)(a), the ground of appeal suggesting the Appellant would suffer undue hardship is not relevant.

The Town of Truro, probably because of its low rate of development, did not identify all areas for medium density development in its M.P.S. The M.P.S. allowed for rezoning, under certain procedural conditions, from low density residential uses into medium density residential uses. One looks to P-212 of the M.P.S. for the procedural sine qua non for the rezoning process. The second qualifying criteria requires that "there are two or more hectares 'involved'." This was seriously disputed, the Town and applicant stating that the two lots on opposite sides of the street make up the two hectares which must be "involved", while the Appellant was of the view that the two hectares must be in one parcel of land. The Board accepts that the "two hectares involved" must be in one contiguous whole and therefore this appeal must succeed on this ground alone. Additionally, Policy 212 contemplates the rezoning of a large area to medium density uses based upon demand. There was no sudden increase in demand for apartments and therefore no need to rezone at this time. Also, Policy 211 prescribes that the administration of the M.P.S. be done in a manner to ensure a sense of security in the Town. Under Policy 211 Council ought to have considered the multiplicity of rezoning applications in this stable community, and ought to have considered and acted upon the stated policy of recreational lands. Policy 266 states a policy to acquire further access to Victoria Park. Since the larger lot is between Victoria Park and an existing street, this policy should have been considered. Policy 263 relates to support for the acquisition of recreational lands. A need for more recreational land has been established, but acquisition can be a financial problem best left to Council. Policy 501 sets out a number of items to be considered by Council. The Planner for the Town says that he considered them, and that the P.A.C. and Council rely on him to consider them. Council itself must consider all these items and cannot delegate this function. The Board determines the decision of Council cannot reasonably be said to carry out the intent of the M.P.S.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended;

- and

IN THE MATTER OF: An Appeal to the Nova Scotia Municipal Board;

- and

IN THE MATTER OF: An Appeal by **DOUGLAS BENEDICT** from the decision of the Council of the Town of Truro, made February 4, 1985, amending the Town of Truro's Land-Use By-law by rezoning lands on the east and west sides of Young Street from R-6 (Residential Rural) and R-2 (Residential Double Family) to R-3 (Residential Medium Density) under Section 63(1) of the Planning Act.

BEFORE: R.H. BLOIS, Q.C., Chairman
DARRYL W. WILSON, C.A., LL.B., Member
RICHARD L. WELDON, Member.

COUNSEL: DOUGLAS A. CALDWELL, LL.B.,and
ROBERT K. DICKSON, Articled Clerk;
for the Appellant;

JEANNE ARCHIBALD, LL.B., and
PETER R. LEDERMAN, LL.B., for
the Applicant.

DAVID W. GRUCHY, Q.C., for the
Town of Truro.

DECISION

This is an appeal by **DOUGLAS BENEDICT** as an aggrieved person under Section 63(1)(a) of the Planning Act from the decision of the Council of the Town of Truro made February 4, 1985, amending the Town's Land-Use By-law by rezoning a parcel of land on the west side of Young Street bounded by Beechwood Drive on the north, Glenwood Drive on the south and church property on the west from R-2 (Residential Double Family) and a parcel of land on the east side of Young Street opposite the first parcel, bounded on the north by a lot of land known as No. 265 Young Street on which is located an apartment building, on the east by Lewis Road and on the south by vacant land, from R-6 (Residential Rural) to R-3 (Residential Medium Density) Zone. The parcel on the west side of Young Street consists of six building lots and contains approximately one acre. The parcel on the east side of Young Street contains approximately four acres amounting in all to at least two hectares.

In this appeal the Board received a Notice of Appeal dated February 26, 1985, on February 27, 1985. The Notice of Appeal indicated that the Appellants were "Douglas Benedict et al". Despite the wording of the Notice of Appeal, the Board's view is that the only Appellant before the Board is Mr. Douglas Benedict. The Board is of the opinion that the Rules do not contemplate, nor does the Statute contemplate, an appeal with undisclosed Appellants.

The post-passage advertisements referred to in the Planning Act, Section 63(2), and required by the Planning Act, Section 60(3), were made in an appropriate newspaper on February 8, 1983, following the passage of the resolution of amendment by Truro Town Council, February 4, 1985.

Other post-passage requirements were also made out.

The Board holds that the Notice of Appeal was timely and the Appeal is properly before the Board as to time on behalf of one Appellant, namely Douglas Benedict.

It is clear from all the evidence that on February 4, 1985, Town Council of the Town of Truro passed an amendment to Truro's Land-Use By-law within the meaning of Section 63 of the Planning Act. That Land-Use By-law amendment may be appealed under Section 63 of The Planning Act by four categories of persons. The next question in this case is whether Douglas Benedict as an Appellant fits into one or more of those categories. On the evidence adduced, the only particular category under which he could fit would be 63(1)(a) of The Planning Act, namely "an aggrieved person".

The Board has dealt with the phrase "an aggrieved person" in great detail recently in a case decided by Elizabeth Lawrence, Vice-Chairman, in an appeal by Riverlake Residents Association, the decision being filed April 30, 1985, NSMB-448-84-P. Mrs. Lawrence, at Page 20 of that decision, referred to the two most restrictive definitions of aggrieved persons quoted to the Board in that particular case from Ex Parte Sidebotham and from Black's Law Dictionary which the Board quotes here in full:

> "A 'person aggrieved' must be a man
> who has suffered a legal grievance,
> a man against whom a decision has been
> pronounced which has wrongfully deprived him
> of something."

[an aggrieved party is]:

> "One whose legal right is invaded by an act complained of whose pecuniary interest is directly affected by a degree or judgment. One whose right of property may be established or divested. The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation."

These definitions, admittedly the most restrictive, can they forestall the present Appellant? As set out in the evidence, the Appellant is a landowner in close proximity to the smaller parcel of land rezoned. He lived in a community forming a part of the Town of Truro in close proximity to all the land being rezoned. On his own evidence, on the evidence of various of his neighbours, and on the evidence of a real estate person, the decision would affect adversely the value of his interest in that land or would be perceived by the Appellant and many others to do so. Even under these most restrictive definitions as cited, the Appellant is a person "whose pecuniary interest is directly affected by the decree or judgment and is of a substantial nature", and the Board is therefore of the opinion that the Appellant is an aggrieved person.

All parties before the Board (the Appellant, the Applicant, and the Town of Truro) concurred that all necessary procedural steps in the appeal had been taken and that therefore the Board had jurisdiction to hear the appeal on its merits. The Board hearing this, and hearing evidence of service of the Notice of Appeal, of service of the Notice of Hearing and of proof of advertisement by newspaper of the Notice of Hearing, proceeded to hear the evidence.

The Notice of Appeal contained the following grounds of Appeal:

> "(a) The decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy;
>
> (b) That the Appellants would suffer undue hardship;
>
> (c) Such other grounds as may appear."

At the opening of the Board hearing, the Chairman discussed with Mr. Caldwell, Solicitor for the Appellant, the Chairman's concern that the ground for appeal "that the Appellants would suffer undue hardship" is irrelevant to this particular appeal since the only way it would apply was if the Appellant were an "Applicant" within the meaning of Section 63(7)(a) of the Planning Act. The Board understands that Mr. Caldwell agreed with the position of the Chairman, and that ground of appeal was not pursued, it being irrelevant to this appeal.

Mr. Caldwell called as his first witness, the Appellant, Mr. Douglas Benedict. Mr. Benedict testified that he was married, lived for the last four years at 80 Beechwood Drive, Truro, Nova Scotia, and has four children aged 3 to 12 years. He said he was a Vice-Principal and a teacher at Shubenacadie District Elementary School and a previous resident of Kenetcook. He believed himself to be the spokesman for the area in which he lived. He limned out in his evidence the rezoned area, the street pattern and the neighbourhood pattern he considered affected by the rezoning. He described recently built apartment units in this neighbourhood. He characterized his neighbourhood as a prime quality low-density residential area. He produced petitions against the rezoning signed by 185 - 190 people and he summarized the rezoning procedures had before Truro Town Council and its Planning Advisory Committee. He gave the Board his views of what he considered to be the Council's violation of the Truro Municipal Development Plan and he cited Policy 212 requiring 2 hectares to be "involved". He also referred to Policy 501. He spent time lauding the quality of life in his neighbourhood which, he said, the rezoning would diminish. The rezoning, he said, reduced the value of his home. He recited a history of frequent rezoning initiatives in his neighbourhood, some of which succeeded, some of which had not, and complained of their frequency.

He tried to give evidence concerning comments made by Councillor Donaldson which attempt was objected to. The net result of the ensuing discussion was that the Chairman ruled that no comments of Councillors before or after the meeting would be heard.

He felt that the S-1 zoning of the church property adjacent to the smaller parcel of land was not a sufficient buffer to allay his fears concerning the value of his land

and the value of the land of his neighbours. He suggested the present use of the smaller parcel of rezoned land was informal recreation. He suggested building of apartment units of a nature and scale contemplated here would change the predictability of the neighbourhood and would be contrary to the Municipal Planning Strategy in a significant way and a financial detriment to the homeowners already there. He felt that the schools would be adequate to handle any increase in school population to be generated by building to the increased density permitted by the rezoning. He said his house was 200 - 300 feet from the intersection of Young Street and the larger block of land rezoned.

Mr. Donald Roy Fraser, 39 Centennial Drive, Truro, Real Estate Salesperson, gave evidence on behalf of the Appellant. He has approximately 16 years real estate sales experience and prior to that he was in automobile sales for some time. He is a 59-year resident of Truro. He is currently employed with Montreal Trust and has been employed there for a year. He expressed himself familiar with real estate values in Truro from his own experience the greatest part of which was in residential sales within Truro and a five mile radius thereof. He was called as an expert in matters affecting real estate sales in Truro and surrounding areas and his qualifications were accepted by the Board with the concurrence of the other parties involved. He had prepared the letter which is found in Exhibit T-6, Page 54, which gives his personal opinion of the effect this rezoning would have on values of the existing single family residential properties; i.e., that it would depreciate the values.

He testified, as to zoning, that purchasers want predictability of zoning and when they are shown a property they inquire about zoning. Purchasers wish to see that zoning will stay as it is or will, at least be in accord with the future land use plan. The witness was not necessarily against apartment buildings, per se. He stated further that apartment houses should be mixed with other types of residential units in the community of Truro, and he believes that this is the way things are heading. He feels it is hard to determine whether or not apartments were in great demand in Truro which, he says, has a population of 14,000. He felt the Appellant's house was diminished in value about 5% by this rezoning.

Mr. Gordon Barss Kinsman resides at 68 Lawnwood Drive, Truro, Nova Scotia. He is a professional agronomist and the Director of the marketing and economics branch of the Nova Scotia Department of Agriculture and Marketing. He has had 36 years of experience in this department. He described the neighbourhood, from his point of view, corroborating much of the evidence of the Appellant. His experience in the neighbourhood dated from 1958. There was no development south of Lawnwood Drive at that time. Development was proceeding very rapidly in 1958. At the time he purchased there were no apartment units built at the corner of Lawnwood and Young. Most of the development was in single family homes. He commented on the Westmount Garden Club in which he was still active. It commenced in January 1963. The Club worked on its landscaping projects, and on community projects, and on behalf of the Town. The majority of the members from this Club came from the Westmount Park Subdivision which includes the lots in the smaller parcel of land rezoned. Members came also from Church Street and the Mount Pleasant Subdivision.

Early in 1970, the smaller parcel, rezoned at Beechwood and Glenwood Drive, was used as a recreation area. Then and now, there was, and is, no recreation area in the south end of the Town of Truro. People made representations to the Recreation Commission and also to the Town Public Planning Advisory Committee for town assistance to establish recreation areas and the Town rented the smaller parcel rezoned for three or four years around 1970-73. The previous development plan for the Town of Truro of 1972 noted this one acre rezoned parcel as a recreation park for the south end of the Town of Truro.

His neighbourhood, although zoned R-2, is made up of single family homes. He fears a breakdown of the integrity of the neighbourhood resulting from this rezoning and hopes it will continue its historical development which has been more or less single family dwellings. Mr. Kinsman felt the rezoning here could bring up to 100 - 150 additional units, 24 units on one side, which would too greatly increase the population density of the neighbourhood.

He said after eight or nine years of working to achieve objectives and not always succeeding, he tends to get a little tired of the struggle.

Mr. Donald G. MacNeil of 75 Beechwood Drive testified that he is the Manager of the Nova Scotia Livestock Commission, a branch of the Department of Agriculture. He bought his present lot about May 1, 1967. From that perspective in time, his evidence was much the same as the evidence of his neighbours, Mr. Kinsman and Mr. Benedict. He felt there had been two previous occasions when developers tried rezoning in the area, and he remembered particularly the events of 1980 surrounding the attempt to have the smaller piece of land rezoned to R-3 In addition, he said there was a rumor concerning an additional development at another time in the past but, when the developer sensed the neighbourhood residents' attitude, he withdrew his development scheme. He then testified concerning the slow construction of the existing apartment houses on the east side of Young Street immediately to the north of the larger parcel rezoned. These units took at least a year or even more to complete.

He stated his number one reason for opposing the present rezoning was that apartment buildings in the areas in question would decrease the re-sale value of his home. In his opinion, he himself, and the majority of the people living in this neighbourhood all had their homes as their largest single life-time investment and were using their homes to build up a life equity, or a retirement equity, and he felt their equities were threatened by the rezoning. He felt that the development on the east side of Young Street permitted by the rezoning would amount to an extremely large congregation of apartment buildings and would be detrimental not only to "his" community but to the Town of Truro. He feels the church property would not be a good buffer because it is only 100' wide and the back yard of the church building does not make a proper buffer since it is a large area open. He criticized the political function performed by the Truro Town Council, in ignoring the attendance of his group as well as in ignoring over 200 signatures on the petitions against rezoning.

Mr. Phillip Raymond Moir, 289 Glenwood Drive, was then called for the Appellant. He testified that he was married, had two children, one 12 and one 9 years of age. He said his property was adjacent to the church that had been mentioned in evidence. On December 1, 1973, he bought his present residence which was then a new house. He had lived prior to that time in an apartment at 411 Pleasant Street for about 5 months. His children went to Douglas Street School. He had spent some effort visiting apartment buildings within Truro, making himself familiar with their upkeep and maintenance, and he recited his unfavourable impression, thus learned, to the Board. He said that he, and others in his neighbourhood, had been faced with many rezoning applications and were tired of fighting.

Mr. Donald Mason of Halifax, called by the Appellant, gave evidence that he was a professional planner since 1967 and a professional engineer since 1962 and it was conceded by all parties that he was an expert sufficient to give an opinion in all aspects of urban planning and was so found by the Board. He said he had been retained two weeks previous to the hearing. His investigation included the perusal of the Municipal Development Strategy, and Zoning By-law of 1983, the 1976 M.D. Plan for Truro and related background papers and other documents in general. He had visited the site in question, and he had studied the documents in this particular appeal. He referred to Policy 211 of the Municipal Planning Strategy as ensuring a sense of security within the Town. He referred to Policy 212 of the MPS and dealt with the matter of 2 or more hectares of land. He said he also had regard to Policy 201 which dealt with the density of all residential areas and changing of zones. He had particular cognizance of Policy 202(b), Policy 205, Policy 208 and Policy 501 (dealing with amendments to the Land-Use By-law), and he also said he had particular regard to the relevancy of Policy 502 to Policy 506 inclusive. Part of these policies dealt with development agreements. He referred to Policy 263 dealing with acquisition of parklands particularly in the southern end of Town. He reviewed the 1976 Truro Planning Policies to see if there were conflicts with the present Municipal Strategy and found that there was a large degree of continuity, the policies in the 1976 plan tending to be more specific regarding recreation. The new plan was more general but he felt that the two were compatible in that general sense. He referred to Urban Policy 263 and in that connection he felt there should be a large field to meet future recreational needs. He reviewed general rezoning under Policy 212, and he further commented on Policy 211 and the rezoning of lower density residential areas upwards.

He suggested Truro can only rezone land in one contiguous lot of at least 2 hectares in extent.

He said he did an analysis of the amendments proposed in Truro to the present planning and development zoning by-laws since February 1983. He said during 1983 there were 5 applications, four of which were zoned upward and one downward. In 1984 there were 13 applications, one was zoned downward and one was rejected. In 1985, there were 11 applications, 8 upward and 3 of which were rejected. Most of the applications upheld by Council had been upward zoning. Usually higher density zoning was allowed by Council. The trend therefore, was for Council to uphold upward zoning and making the residential areas into higher density areas. Throughout, Truro Council discussions concerned 20 apartment units and seemed to be focused on the one acre parcel with no building development specified for the four acre parcel. He suggested that the more likely possibility would be 175 apartment units, a disproportionnate amount of which could be put on the one acre block, with the parking and other facilities being placed elsewhere. He suggested that this particular level of density was contrary to the municipal development strategy. He pointed out that the Town has not grown to its boundary, and there is no urgency for development nor any shortage of land within the Town. He said the demand in Truro was for about 60 apartment units per year and two 30-unit apartment buildings would therefore use up a year's quota for the Town. From 1981 to 1991 there could be projected 1,089 new households in Truro of which 490 would be single family dwellings. This would use up 49 lots per year. Apartment dwellings would use up approximately 60 units per year over the same period. In his opinion, 40% of the new construction would be single family. He said that the matter really boiled down to the sense of scale which would be predicated by the rezoning. He felt ten year's demand for land would be about 144 hectares (which is expressed as 300 acres more or less). There was 43.7 years' supply of land for apartments. He then came to the conclusion there was no shortage of land. He said if the parcels rezoned here were developed, 30% of the 10 year requirement for apartments in Truro would be met in this one rezoning. He said the impact of this rezoning of 175 units would be too severe for a town the size of Truro. The residents, by their testimony, perceived this. He felt there would be close to 600 people in the rezoned site as, if and when, developed. If three additional similar sites were developed adjacent to the south of the parcels rezoned, Truro's entire 10 years supply of apartments could be built on this one piece of property. He says that the MPS and policy outline showed no need or desire to concentrate apartments to this extent in any particular area of Truro. He felt that the MPS actually led to a mixture of apartment complexes in low density areas. He suggests the small town approach was appropriate and that it actually agreed with the "use that you see". He felt that there should be isolated packets of apartments scaled down by way of numbers. He suggested that the appealed zoning would intrude too much into the low density characteristics. He suggested the zoning here does not need to be upgraded. He suggested the plan was to encourage development and there are certain areas which can be rezoned to R-3 but not this particular area. He went on to point out that, in his view, two lots separated by an arterial street through the middle was not a permissible rezoning contemplated by Policy 212. He said that if he followed this erroneous interpretation he could take various one acre sites throughout the Town until the total came to two hectares and then rezone. He stated it was not the intention of Policy 212 to use several little tracts of land to rezone. He suggested there should be neighbourhood studies. The area that he studied formed a community and there is homogeneity throughout. He looked throughout the records and current papers and found no adequate report from the development officer or the planner to the Town Council or to the Planning Advisory Committee. He felt there was a conflict by changing R-2 on the west side of Young Street to R-3. He said he sees the conflict as being with the density of the development on Truro's existing scale which is 7 to 10 people per acre.

He suggested that the development agreement process was not mandatory but a very useful tool both from the developers' point of view and for input of the citizens, and would provide for maximum input from all parties cocerned. He suggested that an agreement would allow for growth in a predictable fashion and would provide for controls for all types and aspects of the development. The development agreement policy clearly recognizes all these problems including the right for a public input. He felt there should be a mixture of development in Truro, some high density, some apartments, some medium density and some single family.

He noted that he had considerable experience in suburban Halifax County development agreements and found them extremely useful from the point of view of all parties. He felt the development agreement method was the only practical alternative to rezoning that would meet the problems of the homeowners abutting. This is the only technique he could see that could be invoked to enforce construction quality and management quality. There is very little quality control, in his opinion, in the zoning by-law and building by-law. He referred to the report of the Planning Advisory Committee and he suggested that Policy 208 as listed therein is really irrelevant to the present rezoning. All it did was encourage development. Policy 205, he suggested, would give little assistance to Council in controlling development. He suggested that "church" was historically part of a residential zone but in recent years had been put into an institutional zone. It was, however, an integral part of the residential neighbourhood and not really any different from the housing nearby. He felt that the 100' lot with the church on it might be an insufficient buffer for the one acre site. He noted the 1976 Truro development plan called for a specific recreation park. The new plan was vague although it referred to a large playing field in the south residential area of Truro. He said the one acre site could be appropriate for such a field.

The perception people have of low density varies from community to community. People are mindful of change. He said, had a sense of scale been applied here, there would have been no approval. He focused on the scale of the possible building allowed by the rezoning appealed from. He felt the conflict was in the possible density on the one acre parcel and as also an intrusion into the other R-2 zone. He noted that Policy 501 sets out the criteria that Council "shall have regard to...". He didn't see in any of the reports that all these criteria were dealt with. He suggested the methodology of these things being considered could vary, but he would expect to have found the criteria of Policy 501 in the staff report dealing with the application and also reference to the legislation under the Planning Act. If asked for an opinion, he would still go back to the planning development agreement. He was not asked. He said that in his view, the R-6 zone was a type of rural holding zone with very little development possible without rezoning.

Ronald Barry Wallace was born in New Glasgow and resided in Truro for 26 years. He is 39 years old, and he was the successful applicant before the Town Council obtaining the rezoning of the lands in question. He described himself as a contractor and a landlord and from the subsequent evidence this appeared to be an extremely accurate description since he has made a career of building apartment units, maintaining the ownership, managing the same, and servicing the same. He has been in the construction business for the last thirteen years and for nine years he has been building apartment buildings in Truro, immediately outside Truro, and in Bible Hill. He has an agreement to purchase the subject lands for the sum of $130,000.00 on certain terms and conditions including the obtaining of R-3 zoning. He suggested a delay in construction occasioned the necessity of a second agreement to purchase. He says he plans to put 24 units on the smaller parcel of land (i.e., the land on the west side of Young Street). He said the height of the proposed building was 27' to the peak. It would be 4' higher than a duplex which could be built under the former R-2 zoning. Concerning the land on the east side of Young Street, he has no planning or design work done. He conceded design work had to be done to conform with the contours of the land. He said there would be very little on-site preparation for the western parcel. He suggested there would be no children in the buildings on the western lot because of traffic problems. He was thinking there would be 96 units over all. The buildings on the east side of Young Street he said, would be designed for children. He contemplated retaining ownership of the completed buildings. The property on the west side of Young Street would have security doors. He said he normally did his apartment maintenance himself. He wanted to stage construction on the east side of Young Street over a five year period. He has stated he has started two 12-unit apartment houses on Kaulback Street and they were to be finished in the fall. Depending on the rental demand, he would start the 24 units on the west side of Young Street, either this fall or the spring of 1986.

He thought that he could build two buildings on one parcel. He did not think it would have to be subdivided on the west side of Young Street. He said one of the units on the west side would face Young Street and one would face Beechwood. He spoke to his selection of tenants. He said he had taken a petition to Town Council himself and he canvassed the residents of Young Street and they were supportive of his position. He feels there is a need in Truro for apartments. He said there were co-op apartment buildings being built in Truro but he did not really compete with them. He has no plans or designs on what he wishes to build on the east side of Young Street. He believes that he could put a maximum of 30 units in one building on the west side.

He said that Councillor Donaldson does his tax accounting and he said he resented any innuendo or allegation, as he phrased it, in the matter.

He said he had not considered any access through the eastern parcel of land to Victoria Park but he would be willing to consider that access if it were ever brought to his attention. He was asked whether or not he was interested in the individual contract development approach and he said it had not been brought to his attention prior to this hearing.

Mr. Peter Nelson is the Town Planner of Truro, among other things. He graduated in 1972 from the Nova Scotia College of Arts and Design with a Bachelor of Design degree in Environmental Design. He testified that he attended the University of Calgary for three years and took courses in environmental design planning but did not complete his Master's degree. His work experience in this field included his employment with MAPC, (HalifaxDartmouth), with Municipal Affairs (at the Strait of Canso), with the Toronto Dominion Bank (in its Montreal Premises Department for Eastern Canada) and with consulting planners in various Calgary locations. He had five years with the Town of Truro as Planning Development Officer, Building Inspector, Co-ordinator and he had participated and been involved in the preparation and use of Truro's Municipal Development Plan. He is not a member of the Canadian Institute of Planners as he had graduated from a non-accredited school and he had never subsequently applied for membership in the Institute.

He was accepted by the Board as a qualified planner. In regards to Policy 212, he said that two hectares were "involved" in the rezoning serviced with an arterial street and thus the requirements of Policy 212 were met. He says the property on the west side of Young Street is buffered by the church property. He said that the P-501 check list was in his mind. He said the technique used here was a satisfactory standard rezoning mechanism. He suspected further resubdivision would be required and there would be required subsequent building and development permits to allow for development according to the rezoning. He said that the history of development in this particular area of Young Street was slow and needed to be encouraged. There were three major strips of development which had grown up over a fifteen or twenty year period. The property in question is contained in the lightly developed strip which has never developed in the way that the two adjacent strips had. This present development would be useful for the Town and would make it better to loop services in accordance with Policy 208.

As to Truro, he estimated the apartment vacancy rate to be 5%.

He said the allowable density could very easily be calculated at a maximum of 32 units per acre. He said that the application met all the criteria necessary for the rezoning and the general planning was good. He suggested that real estate devaluation was not a consideration of his and he could not judge whether it would exist and therefore he could not know whether it affected "security" in that respect. The check list of Policy 501 was in his mind, but he could not say whether it was dealt with by Council. He was the last witness called.

With this overview of the evidence, the Board now perused the briefs which were all promptly filed, the Applicant's on May 7th, the Appellant's on May 10th and that of the Town of Truro, May 9th, 1985.

The general tests to be applied by this Board in a case of this nature have been set out recently in two cases, Oakdene Estates Limited, NSMB-459-84-P, and Michael P. Nash, NSMB-450-84-P. These cases consider the effects of Section 63(3) and 63(5) of the Planning Act, which reads as follows:

> "63(3) The Board shall determine whether the decision of the Council reasonably carries out the intent of the municipal planning strategy."
>
> "63(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot

> reasonably be said to carry out the intent of the municipal planning strategy."

More recently, in Wallace, MacDonald, Lively & Tolson, NSMB-468-84-P, the Board had occasion to apply, in considering that appeal, the very similar general tests called for by Section 71(3) and 71(5) of the Planning Act.

These cases properly set out the tests to be applied by the Board in this case. It is worthy of note, however, that they were all appeals by Applicants from decisions of Council, which rejected the applications to change the status quo; while the present appeal is by an aggrieved person appealing positive acts taken by Council to change the status quo in favour of an Applicant who, of course, was, and at this hearing is, supportive of the Council's position in favour of change.

Truro had its Municipal Development Plan from which it may be useful to quote Subparts 4, 4.1 and the following Policy, P-212, in full context:

> "4. Development Opportunities
>
> Towns in Nova Scotia have experienced a general trend of residential development occurring outside their boundaries. This trend may be the result of overall economic conditions and Federal/Provincial policies with respect to fiscal arrangement with the municipalities. There are indications, however, that this situation may be changing. The Town of Truro must be prepared for this eventuality. Although the Town cannot single-handedly change this trend, it can encourage such change by self-promotion and ensuring a wide range of development opportunities do exist.
>
> 4.1 Future Medium Density Residential Uses

in Low Density Residential Areas

Over the years there has been considerable demand for medium density land uses within undeveloped low density residential areas. This demand is still evident. Rather than attempt to predetermine such medium density use within low density residential areas based on demand provided:

- that a minimum of 2 hectares is involved, and

- that the area to be zoned is abutting and has independent street access to a collector or arterial street as indicated on the Transportation Map.

This should not be interpreted to:

1) accommodate isolated incidences of structures of medium density development; or

2) areas which must make use of local streets in which to gain access to the above collector or arterial streets unless such streets are for the sole use of the area being zoned; or

3) include in existing low density residential areas."

"Policy 212" Therefore, it shall be a policy of Council to:

Permit by zoning amendment medium density residential uses in low density residential areas as indicated on the Future Land-Use Map provided;

- that there is 2 or more hectares involved and

- that the area is abutting or has independent access to a collector or arterial street."

It is clear that the Town of Truro, probably because of its low rate of development did not identify (or inscribe in stone) all areas for medium density development in its M.P.S.. The M.P.S. allowed for rezoning, under certain procedural conditions, from low density residential uses into medium density residential uses.

One looks to P-212 for the procedural sine qua non necessary for the rezoning process and finds the qualifying criteria as two-fold:

> (a) Independent access to collector or arterial streets and
>
> (b) That there are two or more hectares 'involved'.

In this case, the rezoning scheme contemplated rezoning from R-2 (1 acre more or less) and from R-6 (4 acres more or less) in two lots on opposite sides of Young Street, the smaller lot being on the west side of Young Street and the other lot being on the east side of Young Street. R-2 is low density development and R-6 is even lower density, basically an agricultural holding residential zone. Both parcels were to be re-zoned to R-3, and were rezoned to R-3, which is medium density and thus this rezoning triggers Policy 212.

The evidence shows, and it was agreed throughout, that Young Street and Glenwood Drive give all the necessary collector and arterial street access to both or either of the lots.

Serious dispute arose concernig the two hectares required. In a nutshell, the Town and the Applicant stated that the one acre site to the west side of Young Street and 4+ acre site to the east side of Young Street (opposite each other) added together (ignoring the volume of the intervening Young Street as the Board understands the evidence) make up two hectares and, construed thus, this meets the other requirement of P-212 that two hectares be "involved".

The Appellant takes the view, again contradicted, that for P-212 to apply, the 2 hectares "involved" must be in one parcel of land and not two separate parcels of land each under 2 hectares in area and that, consequently, there are less than 2 hectares "involved" in this rezoning application and therefore the requirements of P-212 have not been met. The expert for the Appellant, Mr. Mason, said he was helped to support his position because of the following items:

1. There were two separate parcels of land;
2. On opposite sides of heavily travelled arterial roads;
3. With R-2 zoning on one block;
4. With R-6 zoning on the other;
5. With passive recreational uses on one block;
6. With fenced agricultural uses on the other block.

He further said in greater detail that to come to the opposite conclusion would bring, what was to him, a ridiculous result whereby a person might run around town picking up bits and pieces of land hither and yon until he acquired two hectares in area and then applied for rezoning to a greater density under Policy 212. He suggested that the result of this ridiculous interpretation of the policy might put parking on one lot, building on another with

both lots being widely separated.
The Board agrees that such a construction and such a rezoning would be an absurdity and not contemplated by the strategy for development in Truro.

The Board accepts the Appellant's position that the "two hectares involved" under Policy 212 must be in one contiguous whole. That being the case, the decision of Council appealed from contradicts P-212 of the Truro M.P.S. and this appeal must succeed on that ground alone.

Additionally, in the opinion of the Board, Policy 212 is more than just a procedural policy which enables a person to rezone an area to medium density uses provided the area involved is 2 hectares and abuts an arterial street.

In the opinion of the Board, Policy 212 contemplates the rezoning of a large area to medium density uses based upon demand. The only evidence of demand for medium density use was the evidence of Mr. Mason who referred to the housing scenerio in the Municipal Planning Strategy which identifies 7 hectares of land needed for residential development for the period 1981 to 1991. Mr. Mason stated that there was no sudden increase in demand for apartments in the Town and therefore no need to rezone this area to medium density use at this time.

Based on the evidence at the hearing the Board is not satisfied that a demand for medium density uses has been made out and therefore for these reasons as well the decision of Council is not consistent with the intent of Policy 212.

In addition the Board wishes to consider the rezoning amendment further with regard to the intent of the entire M.P.S. A definitive statement of this requirement was stated by the Board in Wallace, MacDonald, Lively & Tolson, cited above at Page 31:

> "It is clear that in considering a zoning amendment or an application for contract zoning the Town Council is obliged to consider or have regard to certain matters set out in Policy P-4 of the Municipal Development Plan in addition to 'all other criteria as set out in various policies of this plan." (emphasis added)

The Board has already determined that Policy 212 has not been complied with.

The Appellant cited Policy 211 both in his evidence and in the brief submitted on his behalf as calling for a rejection of rezoning "to ensure a sense of security in Town". Policy 211 says:

> "Therefore, it shall be a policy of Council to:
>
> Administer this plan and corresponding Zoning By-law in a judicious and expedient manner to curtail illegal land uses and to ensure a sense of security in Town."

Mr. Gruchy in his submission, quite correctly in the view of the Board, characterizes this Policy as "one which deals with the administration of the plan...". He further states, in continuation of the same sentence, "...and does not address the question of rezoning at all". The Board holds that the Council in its administration of the Plan and corresponding land-use by-law amendment process should so conduct itself so as to ensure a sense of security in Town. In administering the Plan, Council would be administering the rezoning process and thus, the Board, with all deference, disagrees with Mr. Gruchy's statement that Policy 211"... does not address the question of rezoning at all". Policy 211, as it affects the administration of the Municipal Development Plan, prescribes that administration be done in a manner to ensure a sense of security in the Town. Did Council give any weight, or ever consider the effect of Policy 211 in making the decision under appeal? Its Solicitor says now and presumably advised before, that this policy "does not address the question of rezoning at all". Policy 211 is not mentioned in the "Planner's Recommendation to Town Planning Advisory Committee" (see Exhibit T-3, Tab Jan. 11, 1985, Page 8). IT IS NOT MENTIONED IN ANY OF THE COUNCIL MINUTES BEFORE THIS BOARD. Mr. Benedict's brief to Council refers to the preamble of Policy 211 and puts a rather different interpretation on the Policy than is placed on it by Mr. Gruchy and, indeed, different from the one placed on it by this Board. Council had Policy 211 drawn to its attention. Could it thus be said Council, in respect to Policy 211, reasonably carried out the intention of the plan to administer. .. "to secure a sense of security in the Town"?

There was evidence before the Board, not dealt with at Council so far as can be seen, from previous records of the Town (and supposedly were also available to the Town) that there had been a recent (1980) unsuccessful rezoning application of the smaller parcel of land; that between then and now there had been a successful rezoning to R-3 (following upon which the existing apartment units were built on the east side of Young Street immediately north of the larger block in question.) There was another attempted (but withdrawn) rezoning of which witnesses had knowledge.

There is the existant rezoning. There was a parallel-in-time effort when, under the previous Municipal Plan, the smaller lot was designated for recreational use, when it was rented for such use in the early 1970's and when the recreational needs of Truro in its southern end were recognized by Council in the development plan but were not seriously funded. This area of Truro saw an increase of housing stock from, at least, the early 1970's and one might suppose there was a population increase following upon such increase in housing stock and therefore an increasing demand for recreational use over the time period of these two successive municipal plans. In any event, clearly, neighbourhood political activity over these years was extensive. It came to a point, as said the witness Gordon Barss Kinsman, when, somewhat frustrated by all this activity..."we became tired". Again in this context, the witness Donald Roy Fraser stated the apartment units ought to be spread within the community. Council under Policy 211, in deciding to administer another rezoning hearing in this area, ought to have had brought to its attention, and ought to have considered the multiplicity of rezoning applications brought in this stable community, and ought to have at least fully considered and acted upon the stated policy of recreational lands before risking an increase to the population in so radical a fashion as is predicated by this rezoning. As the Board sees it, Policy 211 had this meaning. Council ought to have considered this meaning and in that regard, at least, failed reasonably to carry out the intent of the Municipal Development Plan.

Policy 266 reads gramatically as follows:

> "Therefore, it shall be a policy of Council to:
>
> - Acquire further access to Victoria Park."

There is no indication in the Planner's Report or in the various submissions for and against this particular rezoning that this policy was specifically brought to the attention of Council. Since the larger lot rezoned abuts Victoria Park on the whole of its eastern side (which is its larger dimension) and runs through to Young Street, this Policy ought to have been dealt with, even if only to be discounted. The Applicant testified that he would be willing to deal with Council as to access but that he had not gotten to that stage yet so it is clear that park access was never discussed, even with staff. The larger rezoned location demanded consideration of Policy 266. Such consideration was not given.

Mr. Caldwell cited Policy 263 as being a reason, in itself, to refuse rezoning and, in essence, of course to allow the appeal.

> "Therefore, it shall be a policy of Council to support the Parks and Recreation Commission in the acquisition of larger parks or recreational sites where a need is established."

Given the history of residential growth in the neighbourhood over the years under this policy and under a preceeding, but similar policy, Policy 263 gives the Board some pause as to whether Council did, or did not, properly deal with this Policy. The evidence of growth in the neighbourhood plus the existence of two successive development plans with similar goals showing a need for recreational land in the south end of the town, aggravated by the growth that had taken place during the time interval being considered and likely to be aggravated at a higher rate, if rezoned land is built upon to its highest density, might require Council's consideration under Policy 263. The Planner's Report and the Minutes do not deal with Policy 263. The Board feels that a need for more recreational area has been established. The acquisition of land, however, can be a financial problem and a financial problem is a question best left to Council which is responsible to rate for the purchase price of the land. Since it is not necessary for its decision, the Board refrains from further discussion or from making any finding on Policy 263.

Policy 501 as set out below denotes additional matters which Council shall consider in addition to all other provisions of the Plan in a rezoning application which falls within Policy 500.

> "Policy 501: Therefore it shall be a policy of Council to:
>
> In considering amendments to the Zoning By-law, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:
>
> a) That the proposal is in conformance with the intents of this Plan and with the requirements of all other Town By-laws and regulations;
>
> b) That the proposal is not premature or inappropriate by reason of:
>
> i) the financial capability of the Town to absorb any costs relating to the development;
>
> ii) the adequacy of sewer and water services and utilities or if services are not provided, the adequacy of physical site conditions for private on-site sewer and water systems;
>
> iii) the adequacy and proximity of school, recreation, and any other community facilities;
>
> iv) the adequacy of road networks in, adjacent to, or leading to the development;
>
> v) the potential for the contamination of watercourses or the creation of erosion or sedimentation;
>
> vi) creating a leap-frog, scattered or ribbon development pattern as opposed to compact development.
>
> c) That controls are placed on the proposed development so as to reduce coflict with any other adjacent or nearby land use by reason of:
>
> i) type of use;

ii) emissions including air and water pollutants and noise;

iii) height, bulk, and lot coverage of the proposed building;

iv) traffic generation, access to and egress from the site, and parking;

v) open storage;

vi) signs;

vii) similar matters of planning concern.

d) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway rights-of-way and other nuisance factors.

e) Provision for buffering screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

The Planner's recommendation was silent as to Policy 501. The Minutes of the Committee and Town Council do not note any consideration of Policy 501. Some mention is made in the Garden Club recommendation (see T-6, Page 50 following and particularly at Page 52) but this is a brief reference to only a small portion of Policy 501. Mr. Nelson, the Planner, says he considers all these things, and the P.A.C. and Council rely on him to consider these things. Mr. Gruchy states on the subject in his submission "It is submitted that these considerations shall be made when appropriate. There is no need to consider formally each and every amendment." In contrast with this belief is the evidence of the Planner, Donald Mason, who in essence testified concerning Policy 501 as follows (at least pharaphrased);

"I should have thought that these items would at least had been listed and dealt with one by one even if, in the appropriate case, an item would have been introduced merely to be dismissed as non-applicable." Without, at this time, deciding between the two somewhat divergent points of view above summarized, the Board will inquire from the evidence before it, what substantial portions of Policy 501 are related to this appeal.

> "Policy 501(b)
> ...premature... or inappropriate by reason of:
>
> i) Financial capability of the Town." No real evidence of development cost was given but it appears services were in or near and internally would be the problem of the developer. Off-site services such as sewer treatment, water supply, were not dealt with although schools were.
>
> ii) See (i) above.
>
> iii) See (i) above.
>
> iv) The evidence showed road access was adequate.
>
> v) There was no evidence, pro or con, though from the site, the proximity to a large park, these considerations should clearly have been dealt with.
>
> vi) These clearly, from the evidence, may be a leap frog or scattered as opposed to a compact development and therefore would be perhaps inappropriate or premature.
>
> Policy 501(c)
>
> i) Type of use. This land abuts park land. Perhaps the proximity of higher density area to park development would have been useful to each. In any event, this avenue ought to have been explored. The question of whether or not there was a conflict was explored.

ii) Emissions, etc., were not dealt with, nor was noise.

iii) Height, breadth and lot coverage of the building all on the site had to be dealt with. It was done in a rudimentary fashion on the smaller lot before the Board and not at all for the larger one and indeed the same pattern was basically followed at Council.

iv) Traffic access and egress to the site is mutually affected by the change in zoning and ought to have been dealt with.

v) Open storage. No evidence adduced.

vi) Signs - No evidence adduced.

vii) Similar evidence of Policy. No evidence adduced.

Policy 501(d)

Suitability of Site. Evidence seems to show suitability of site for either R-2, R-6 or R-3 use in an on-site sense. In any event, the facts ought to have been reported on to Council.

Policy 501(e)

There was evidence given of buffering both before Council and before this Board. Whether the buffering proven was adequate is another question but at least both Council and this Board had evidence before them."

The Board has no hesitation in saying that the intent of Policy 501 and in particular the opening part of it, is that the Council shall regard, at least, all the items therein contained and that it violated that intent when according to the Planner, HE SAYS HE CONSIDERED all these aspects and Council delegated to him these considerations. Council cannot do that. It must consider all items set out in Policy 501 and it cannot delegate this function.

In so delegating (and that is the evidence on that subject before this Board), Council did not resonably carry out the intent of the Municipal Development Strategy as contemplated by Section 63(3) of the Planning Act. Under Section 63(5) of the Planning Act the Board determines that the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy. In any event, it is clear that Council should have considered in a substantial manner, in addition to all the items it did consider, the following:

Policy 211 as defined by the Board;
Policy 212 as defined by the Board;
Policy 266;
Policy 501(a), (b)(i); (ii), (v), (vi);
Policy 501(c)(i) as interpreted by the Board;
Policy 501(c)(iv), (vi).

In addition the Planner's reference to Policy 205 would tend to mislead a reasonable Councillor into thinking some sort of control of development might flow from the rezoning followed by the application of Policy 205. The Board feels Policy 205, whatever its merits, if any, has no real value as a development control.

Under Section 63(4)(b) of the Planning Act, for the reasons stated, the Board will allow the appeal by reversing the decision of Council amending the Land-Use By-law.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of August, A.D., 1985.

R.H. BLOIS, Chairman.

DARRYL W. WILSON, Member.

RICHARD L. WELDON, Member.

NOVA SCOTIA MUNICIPAL BOARD.

Behiels et al. v. Town of Wolfville

PLANNING--CONTRACT ZONING--DEVELOPMENT AGREEMENT--GRANTED TO PERMIT TWO 18-UNIT APARTMENT BUILDINGS AND ONE SINGLE FAMILY DWELLING--CONSISTENCY WITH INTENT OF M.P.S.--PLANNING ACT, S. 71--TOWN OF WOLFVILLE M.P.S. POLICY 11, SS. 20.2, 20.3

This is an appeal by six individuals as aggrieved persons from a decision of the Town Council of Wolfville approving a development agreement permitting two 18-unit apartment buildings and one single family dwelling. The Appellants are residents of the Blomidon subdivision where the proposed development is to take place. The subdivision presently has six single family dwellings and a six-unit apartment building. The site contains 2.3 acres of undeveloped land and is the only land remaining in the subdivision to be developed. Access to the site will be by way of a cul-de-sac. The site is zoned R-2. The Town of Wolfville has a Municipal Planning Strategy (M.P.S.). On the Future Land-Use Map in the M.P.S. the subject site is designated residential.

HELD: The Board confirms the decision of Council.

The issue in an appeal from a decision approving a development agreement is, pursuant to s.71(3) of the Planning Act, whether the proposed agreement is consistent with the intent of the M.P.S. It is clear that the proposed use is one which is permitted under the R-2 zoning category for the property. A development agreement is required because the development is located on land exceeding 5,000 sq. metres and the development cost exceeds $500,000.00. The Council in evaluating the appropriateness of a special development must consider the criteria outlined in paras. (a) to (j) in Policy 11, Section 20.2 of the M.P.S. Council must make an informed assessment of these criteria and not an arbitrary assessment. Therefore, Council should be provided with information on these criteria. The Board is satisfied that Council did have information on which to evaluate the appropriateness of the development. The concerns of the Appellants relating to impact on the natural environment, delivery of water services and flooding on Gaspereau Avenue were all presented to Council at the public hearing. Council does not have unfettered discretion to deal with development proposals in any manner it deems appropriate; it is to be guided by the M.P.S. The Appellants may have been of the impression that the subject site would be developed with single family dwellings, but these lands have never been subdivided into single family lots and there is no evidence the Town represented this to the Appellants. The proposed development will drastically change the nature and character of the subdivision, but the Town's M.P.S. and Land-Use By-law permit apartment buildings on the site. The Appellants have not discharged the onus on them of proving the agreement is not consistent with the intent of the M.P.S. The Board is satisfied the proposed agreement is consistent with the intent of the M.P.S. Greater control over the location and the effects of high density development is a matter Council might wish to address when it reviews its M.P.S.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, c. 9;

- and -

IN THE MATTER OF: An Appeal by **MICHAEL** and **LINDA BEHIELS, MIKE** and **LORNA MacNEIL** and **DAVID** and **DIANA DOAKE** from the decision of the Council of the Town of Wolfville made on March 18, 1985, approving a contract development with **JOHN CROOKS**, to permit the construction of two 18-unit apartment buildings and one single family dwelling on land located immediately south of the intersection of Sunset Drive and Riverview Drive in the Town of Wolfville.

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: MICHAEL BEHIELS and DAVID DOAKE, represented the Appellants without Counsel.

GORDON C. MacDONALD, Q.C. and BYRON BALCOM, ESQ., Articled Clerk, for the Developer, John Crooks.

DERRICK KIMBALL, LL.B., on behalf of the Town of Wolfville.

DECISION

This is an Appeal under Section 71(1)(a) of the Planning Act, 1983, S.N.S., c. 9, by **MICHAEL** and **LINDA BEHIELS, MIKE** and **LORNA MacNEIL** and **DAVID** and **DIANA DOAKE** as aggrieved persons from the decision of the Council of the Town of Wolfville made March 18, 1985, approving the application of **JOHN CROOKS** for a development agreement which would permit the construction of two 18-unit apartment buildings and one single family dwelling on land situate immediately south of the intersection of Sunset

Drive and Riverview Drive in the Town of Wolfville.

The Appeal was heard in the Council Chambers of the Town of Wolfville on June 11, 1985.

The Notice of Appeal is dated April 15, 1985, and it was received by the Board on April 16, 1985. The decision of Council approving a special development agreement was advertised in the Kentville Advertiser on March 27, 1985.

At the commencement of the hearing, Michael Behiels testified that he served a copy of the Notice of Hearing on the persons designated in the Board's letter dated May 16, 1985. All the parties agreed that the appeal was properly before the Board and the Board assumed jurisdiction to hear the merits of the appeal.

The grounds of appeal as set forth in the Appellants' Notice of Appeal filed as Exhibit B-1, read as follows:

> "1. In the view of the residents of Blomidon subdivision, the development proposal by Mr. Crooks will alter in a very dramatic fashion the nature and character of this very small subdivision. The Wolfville Town Council has not taken into consideration the fact that this development proposal will affect adversely the property value of the existing single family homes. The Town of Wolfville, we feel, does not have the right to approve a development project which, by its very nature, will diminish the property values of its present citizens.
>
> 2. The Development Proposal fails to comply fully with several aspects of the Municipal Development Plan's section dealing with Special Development Proposals, i.e. 20.2(a), (d), (e), (f), (g), (h), (i) and 20.2, ii(a) & (c).
>
> 3. The development proposed by Mr. Crooks is neither compatible with, nor

appropriate for, the small surrounding neighbourhood. If the Wolfville Town Council enters into a Special Development Agreement with mr. Crooks it will be putting into question the integrity and stability of the Town of Wolfville's Municipal Development Plan.

The Municipal Development Plan, 20.2, ii(a) & (c), stipulates that a Special Development Agreement should ensure that architectural design, character, and external appearance of buildings and structures

'a) be compatible with the surrounding neighbourhood;

b) maintain a scale appropriate for the neighbourhood and Town.'

4. The Town has failed to provide its citizens with an 'assessment of the impact of the proposed development on the Town's service delivery and/or facilities and whether such impact would be sustained by present or expected resources.' See Municipal Development Plan, p. 12, 20.2 (d), (f).

5. Council has failed to take into account the problems associated with access, traffic circulation and parking in such a restricted area as per the Municipal Development Plan 20.2, iv.

6. The Council has failed to consider seriously the ecological implications of the proposed development as per section 22 of the Zoning By-law, p. 21 and the Planning Act, Statutes of Nova scotia, 1983, Chapter 9, Prohibition of Structure near Watercourse, 54, 4b.

7. The Council has not adequately considered the implications of not requiring the Developer to set aside a certain amount of green space for recreational purposes.

The issue for the Board's determination in an appeal by an aggrieved person from a decision of a Council approving the entering into of a development agreement pursuant to Section

55 of the Planning Act is found in Section 71(3) which reads as follows:

> "The Board shall determine whether the proposed agreement is consistent with the intent of the municipal planning strategy."

The Town of Wolfville has a Municipal Planning Strategy (M.P.S.), formerly known as a Municipal Development Plan, (Exhibit B-4) in effect since August 9, 1978, when it was approved by the Minister of Municipal Affairs. The Town also has in effect a Land-Use By-law, formerly known as a Zoning By-law (Exhibit B-5) approved by the Minister on the same date.

The land on which Mr. Crooks proposes to construct two 18-unit apartment buildings and a single family residence is located in an area of the Town known as Blomidon Subdivision. The site contains 9,650 square meters or 2.3 acres of undeveloped land. The Blomidon Subdivision is located between Pleasant Street and Highway 101, the main Provincial Highway running through the Annapolis Valley. The sole access to the subdivision is from Pleasant Avenue, a main collector street, south to Riverview Avenue, a small street within the Subdivision. The only other street in the Subdivision is Sunset Drive which runs eastward from Riverview Avenue at a point near the south end of Riverview Avenue.

The proposed development will be located south of the intersection of Sunset Drive and Riverview Avenue, at the most southerly part of the Blomidon Subdivision. The Subdivision is presently developed with six single family dwellings and one small apartment building containing six units. The subject land is the only land remaining in the Subdivision to be developed. The site is bounded on the north by three single family dwellings, on the south by Highway 101 and on the east and west by residential properties which are not part of the subdivision. Ingress and egress to the site will be by way of extending Riverview Avenue southward between lots 5 and 12 of the existing subdivision and creating a Cul-de-sac in front of the apartment buildings. It is proposed to subdivide the land into three lots; Lot 6 containing a single family dwelling and lots 7 and 8 each containing an apartment building with 18 units. Most of the apartment units will be one bedroom units. Parking will be provided for 23 vehicles for each apartment building at the rear of the apartment buildings.

The subject property is located in an area which is designated residential on the Future Land-Use Map which forms part of the Town's Municipal Planning Strategy. The site is Zoned R-2 which permits the following uses:

> "All Residential Single Family (R-1) uses
> Row Housing
> Boarding Houses
> Converted Dwellings
> Duplex Dwellings
> Semi-detached Dwellings
> Apartment House
> Limited Occupancy Housing
> Mobile Homes within a mobile home park and
> subject to Mobile Home Park By-law."

The details of Mr. Crooks' proposal is set forth in the form of a proposed Special Development Agreement which was filed as Exhibit B-13. The draft Agreement includes the following covenants:

"1. The Town and Crooks covenant and

agree that the By-law of the Town of Wolfville, which adopts the 1980 National Building Code of Canada, will in all respects govern all standards and specifications of construction on or about the development site.

2. The Town and Crooks covenant and agree that the development shall in all respects comply with the requirements of the Land-Use By-law (formerly known as the Zoning By-law) and subdivision regulations of the Town of Wolfville and the policies of the Municipal Planning Strategy, filed as P-3367 and P-3368 respectively, at the Registry of Deeds Office at Kentville, Nova Scotia, except only as herein otherwise specified.

4. Crooks shall locate the development in the area designated in Schedule "B" attached hereto;

5. Crooks shall carry out the development in full and strict compliance with the specifications hereinafter set out and designated in Schedule "A" attached hereto;

8. Crooks covenants and agrees that it shall be wholly responsible and liable for any and all damage of whatever nature caused to public or private property by Crooks, his heirs, agents or assigns or any contractor or other individual working on or in connection with this development and Crooks further covenants and agrees to save the Town harmless from any cause of action or liability arising out of or in connection with any construction work, or other work on this development.

9. The Town and Crooks covenant and agree that no building permit shall be issued respecting any development located or to be located on the lands described in Schedule "B" unless the Development Officer for the Town of Wolfville is satisfied that all necessary permits and conditions of this Agreement have been met;

10. Crooks covenants and agrees with the Town that in addition to any and all other

requirements herein to be performed or met by Crooks, Crooks shall do the following:

a) The parties hereto acknowledge that it is currently contemplated that storm sewer drainage of the lands described in Schedule "B" shall be to the south of the said lands. However, notwithstanding this, the Development Officer may, in his sole discretion, designate where and in what manner the said lands shall be drained.

b) Crooks covenants and agrees that the location, design, number and volume of garbage receptacles shall be as designated by the Development Officer in his sole discretion.

c) Crooks covenants and agrees that he shall be responsible for the installation of all roads and other services at his own expense.

d) The development herein is comprised of two 18-unit apartment buildings and one single family dwelling. Crooks shall provide for each of the apartment buildings a parking area large enough to accommodate a minimum of 23 vehicles and in the case of the single family dwelling, one additional parking space.

14. The Town and Crooks covenant and agree that notwithstanding the strict terms of this Agreement, the Development Officer for the Town of Wolfville, in his sole discretion, may on the request of Crooks, approve any modifications or amendments to Schedule "A" or Schedule "B" so long as any such modification is not contrary to the spirit and intent of this Agreement.

15. The Town covenants and agrees that Crooks shall not be required to provide land or cash in lieu by way of satisfying the open space provisions of the Land-Use By-law, and it is specifically acknowledged that Crooks shall have no obligation pursuant to the requirements of paragraph (2) of the Land-Use By-law with respect to this development.

Attached to the draft Agreement as Schedule "A" are three drawings showing the foundation plan, the floor plan and the right, left, rear and front elevations of the proposed apartment buildings. Attached to the draft Agreement as Schedule "B" is a plan of survey prepared by Hiltz & Seamone Company Limited dated March 18, 1985, showing:

1. The location and boundaries of the site;
2. The location and boundaries of the proposed subdivided lots - 6, 7 and 8;
3. The location of the two apartment buildings on lots 7 and 8 and the parking space required for each building;
4. The extension of Riverview Avenue and the cul-de-sac ingress and egress to the site;
5. The location of the storm sewer drainage.

Witnesses called on behalf of the Appellant were Joan Bromley, Greg Ross, Sandy Fraser, Michael MacNeil, Michael Behiels, Jean Marsh and Charlotte Haley. The only witness called on behalf of the Town was Gregg Morrison. The Developer did not call any witnesses. Persons making submissions to the Board were Edward Connolly, Norman McGuiness, Tony Stewart and Edward Eagles.

Joan Bromley is a Councillor in the Town of Wolfville. She voted against approving the Special Development Proposal. She read from a prepared text filed as Exhibit B-8 which reads as follows:

> "According to the Municipal Development Plan of the Town of Wolfville, Council's prime intent is to maintain a pleasant residential living environment and

viable town centre.

The special development under consideration will further diminish the quality of an environment already reduced by the construction of Highway 101 along the Town's southern boundary.

The position of those who promote development in Wolfville is that we must provide housing for those who wish to enjoy the ammenities of a town such as ours. These include open spaces and quiet streets. Erection of two 18-unit apartment buildings in the proposed area will not only eliminate a buffer zone and open space between the established residents and the 101, but will subject the new apartment dwellers to the noise and chemical pollution of a main traffic artery. Is this a pleasant residential living environment?

According to the Municipal Development Plan, in determining the appropriateness of a special development proposal, Council will be guided by the impact of the development upon the natural environment by erosion and the suitability of the site of the development in terms of soil and geological conditions.

The site of Lot 8 is a natural watershed and ground water recharge area as evidenced by the presence of a large covey of alders and other marsh plants. It is an environmentally sensitive area, which will, because of the slope of the terrain, generate severe erosion when it is disturbed.

A third condition put forward by the residents immediately affected by this development is that the proposal of Mr. Crooks is neither compatible with nor appropriate for the neighbourhood.

But for these considerations the proposed development meets all the criteria of a special development within an R-2 Zone.

As a Councillor, I consider these points will become more important in the future even than they are now. I cannot accept the ill founded logic of voting in favour of a proposal I can condone simply because

> it conforms to a By-law with whose foundation I had nothing to do and with which I do not agree.
>
> I believe that our laws need more flexibility. We do as Councillors, after all, represent our constituents. There is something amiss when we are so hog-bound by legislation that we cannot abide by the will of the people."

Greg Ross also is a Councillor in the Town of Wolfville. He voted in favour of approving the special development proposal because the development complied with the requirements of the Land-Use By-law and was consistent with the intent of the Municipal Planning Strategy. Mr. Ross says that the Town needed apartment housing and he did not oppose apartment buildings on the subject site. In his opinion the development of apartment buildings is a residential use of the property and is compatible with the adjacent single family residential properties. He did have reservations about the number of units to be developed but was advised that the number of units proposed met the requirements of the Town's Land-Use By-law. He did not think the development would create a traffic problem.

Sandy Fraser teaches at Acadia University and is a resident of the Town of Wolfville. He is a member of the Town's Volunteer Fire Department. He was a member of the Town's Planning Advisory Committee when the Municipal Planning Strategy was being formulated in the late 1970's. Mr. Fraser stated that he did not look at the Municipal Planning Strategy and its relation to this particular development. He was concerned about the proposed cul-de-sac because it may prove difficult to get to parts of the buildings in case of a fire. He also expressed the concern that given the existing water pressure and water volume in the area, facilities "may be getting close to being inadequate" in case of a fire. Mr. Fraser also said that Councillors were advised by the Town Planning Officer, Dr. John Connors, to approve the development agreement and many Councillors felt they had no discretion to deny the agreement if the proposed development met the requirements of the Town's Land-Use By-law.

Michael MacNeil, one of the Appellants, resides at 8 Sunset Drive and his property abuts the subject site. When he purchased his property in 1974, he was not aware of its zoning. He also was not aware that the Blomidon subdivision was zoned R-2 with the adoption of the Municipal Planning Strategy and Land-Use By-law in August, 1978, or that the apartment buildings were permitted uses in an R-2 zone. When he purchased his property, a real estate agent showed him a plan of the subdivision which indicated that the subject property was subdivided into single family lots numbered 6 to 11. A copy of that plan was introduced as Exhibit B-10. Mr. MacNeil said he bought his lot because it was a very nice property with the area to the south of his land a haven for birds. He recently spent a large sum of money in renovations to his property and he feels the proposed development will reduce its market value. His objections to the development include:

"1. It's size, too many units in too small an area;

2. Single access;

3. Not compatible with the existing

neighbourhood;

4. Concern with lack of play area for children;

5. Concern with increased traffic and safety of children;

6. Concern with future water pressure."

He also stated that as a result of his personal experience with the tenants of a small apartment building on Sunset Drive across from his property, he is concerned with the activities which take place in apartment buildings and how this will affect the enjoyment of his property. Mr. MacNeil further stated that when his Wife consulted the Town Clerk about high density development on the subject site, she was left with the impression that the Town did not consider high density development feasible for this site.

Michael Behiels, an Appellant, resides at 4 Riverview Avenue, approximately 100 feet north of the subject site. He purchased his property in 1980 and it was lot number 4 of the Blomidon subdivision. He is a Professor at Acadia University. He introduced a survey plan of the Blomidon subdivision, filed as Exhibit B-11, which contained the following certificate of Gordon Bayne, Development Officer for the Town of Wolfville, dated October 29, 1980.

> "I certify that the plan of the Blomidon subdivision which was approved on January 29, 1968, has been amended by eliminating the allowance for a future road between lots 4 and 5 and attaching this allowance to lot 4 on October 28, 1980."

This plan also shows the land which is the subject of this appeal divided into six smaller lots numbered 6 to 11 inclusive.

Jean Marsh resides at 40 Pleasant Street in the Town of Wolfville. She has been a member of Council for fourteen years and a member of the Planning Advisory Committee on several occasions during that time. She voted to approve the special development agreement because she thought the site was suitable for an apartment dwelling. She did express concern that individual lots could be consolidated and therefore mislead people who buy land based on survey plans showing the land being developed as single family residences.

Charlotte Haley, a former resident of the Town of Wolfville, resides in Black River, Kings County. She was a member of the Town's Planning Advisory Committee at the time the Town's Municipal Planning Strategy was being formulated. She said that the main objective of the Municipal Planning Strategy was to preserve the character of the Town as a small residential town. She stated that when the Municipal Planning Strategy was being prepared, no one involved in the process thought high density development would occur or be needed in the Town. In her opinion the plan is out of date and not suited to dealing with high density development in the Town. She also feels the plan allows too wide a range of uses in an R-2 Zone.

Not called as witnesses for any of the parties but making submissions to the Board were Edward Connolly, Norman McGuinness, Tony Stewart and Edward Eagles, all of whom spoke against the proposed development.

Edward Connolly resides at 120 Gaspereau Avenue, which is within 70 feet of the eastern boundary of the subject site. Mr. Connolly stated part of the site is marsh land. He was concerned that the storm drainage proposed for the site which is southward toward Highway 101 might back up and overflow onto his property. He wanted to know who would have to pay for the cleanup of this overflow if it occurs. He was also concerned about future water pressure in the area. He said his house is at the highest elevation in the area and as a result of recent changes to the water facilities made by the Town, the water pressure is adequate. He feels that the addition of 36 units in the area will cause the existing water pressure to drop. He also said that as a result of conversations he had with Gordon Bayne, the former development officer for the Town, the site would not be developed because of "incompatibility of sewer depths and need for a pumping station to pump this sewage up."

Norman McGuinness resides at 12 Westwood Avenue and his property is located in an area of the Town which is zoned R-2. He is a Professor at Acadia University. According to Mr. McGuinness, approximately 75% of the residential properties in the Town are in areas zoned R-2. He is concerned with the way the R-2 Zone is being administered by the Town's officials. He said that so much of the Town is presently developed with single family dwellings but zoned R-2 that no one in these areas can be certain what will be developed next to their property.

He questioned the Town's Development Strategy. It seemed to him that the Town through its Municipal Planning Strategy encouraged apartment building construction in R-2 Zones with no consideration for the single family homeowners. Mr. McGuinness said that because of the loose nature in the way the Plan has been devised there is a need for Councillors to exercise discretion in approving the location of apartment buildings in R-2 Zones in the Town.

Tony Stewart resides at 18 Acadia Street in the Town of Wolfville. He is the Principal of Port Williams Elementary School. Mr. Stewart served as a member of the Planning Advisory Committee for three years in the late 1970's when the Municipal Planning Strategy was being formulated. He said that the Planning Advisory Committee, at least while he was a member, considered that the area in which the subject site is located would be developed with single family residential properties and not with multi-dwelling apartment buildings. In his opinion, the subject site is not an appropriate location for an apartment building.

Edward Eagles is a professor at Acadia University and he resides at 24 Westwood Avenue in the Town of Wolfville. In his opinion, the residents of the Town are not sufficiently protected by the Municipal Planning Strategy and the only protection citizens have in preventing the devaluation of their properties as a result of apartment buildings being developed nearby rests with their Town Councillors. He feels Councillors should err on the side of the citizen in approving the location of apartment buildings in R-2 Zones.

Gregg Morrison, the Development Officer and the Director of Public Works for the Town of Wolfville, gave evidence on behalf of the Town. Mr. Morrison was appointed to the positions of Development Officer and Director of Public Works on November 5, 1984. He has attended all meetings of the Planning Advisory Committee and Town Council in which the proposed development was discussed and is familiar with the development. Mr. Morrison referred to the various policies in the Town's Municipal Planning Strategy which relate to the proposed development. Part 2 of the Municipal Planning Strategy concerns development policies and at page 3 contains the following objective:

> "A basic developmental policy assumption is put forward viz. that the Town of Wolfville should continue to maintain its existing general structure as an essentially residential and institutional town.
>
> Planning in the Town of Wolfville will be devoted to:
>
> a) maintaining and improving the living environment;
>
> b) ensuring compatibility between land uses;
>
> c) promoting development of, and improvements in, the quality of municipal services;
>
> d) promoting development of employment and income opportunities available to the residents of Wolfville and its environs.
>
> To these ends, the Council of the Town of Wolfville has adopted and intends to promote the following policies. Actions described herein will be undertaken as and when resources become available to the Town."

Part 2, Policy 4 deals with housing and section 13(iv) of the Policy on Housing reads as follows:

> "Council wishes to encourage the provision of a range of housing by type and size, specifically, Council intends to provide varying zone requirements to satisfy the needs of different groups of citizens and the Town."

Mr. Morrison said that this statement encourages the development of a wide variety of types of housing in the Town.

Part 3 of the Municipal Planning Strategy deals with implementation policies. Policy 11 relates to development control and by-laws. Section 20.2 of Policy 11 concerns development control and special development proposals and it reads as follows:

> "In the ordinary course of events it is expected that the administrative procedures for development control will be routine, i.e. for a development proposal in keeping with the policy statements of the Municipal Development Plan in paragraph 9 and its following paragraphs and conforming to the requirements specified in the zoning by-law. Council recognizes, however, that there may arise development proposals or opportunities of such a nature that could not be regarded as being of a routine or on-going category. Such development proposals will be known as Special Development Proposals. Consideration to be taken into account in regarding a development proposal as being 'non routine' or 'special' is stated as follows: where the intended development will ultimately require a substantial financial expenditure amounting to $500,000.00 or more, or projected building(s) will have a floor area of 2000 sq. metres or more or the intended development will be located on a parcel of land of more than 5000 sq. metres. Secondly, where a development is proposed for the Town Centre Cl Zone as defined in Policy 1, page 4, and which could not otherwise comply with the detailed requirements for the zone but nevertheless Council believes should be permitted in the best interests of the Town

of Wolfville. In dealing with Special Development Proposals as defined above, the Council of the Town of Wolfville intends to reserve the right to deal with such proposals under the provisions of the Planning Act 1969 as amended, sections 55 and 56 as appropriate. In arriving at its decision regarding special developments the Council will seek the advice of its Planning Advisory Committee, will provide notice of the intended special development, and may call for a public meeting of the Town's citizens so that the details and circumstances of the proposal(s) may be explained and the members of the public be afforded an opportunity to express their views on the intended special development. In determining the appropriateness of a Special Development proposal, and any procedures necessary to accomplish the development if the proposed Special Development is deemed to be desirable, Council will be guided as follows:

a) Council will seek to maintain and/or advance the best interests of the Town of Wolfville and its citizens;

b) Protection of the revenues of the Town of Wolfville;

c) The proposed development shall not violate other policies of this plan;

d) Council's assessment of the impact of the proposed development on the Town's service delivery and/or facilities and whether such impact would be sustained by present or expected resources;

e) Council's assessment of the impact of the proposed development on any aspect of transportation amenities;

f) Architectural design, yards and location as these may affect fire and police protection;

g) The financial capacity and the desirability of the Town to absorb any costs relating to the special development upon analysis and itemization of the costs which may be brought about by the proposed development;

h) Potential impact upon the natural environment such as erosion, contamination of water courses and all forms of pollution;

i) The suitability of the site for the proposed development in terms of steepness of grades, soil and geological conditions, location of natural and/or man-made features;

j) Such matter(s) as may be appropriate to the determination of whether the proposed special development may be considered premature or in any way undesirable for the Town of Wolfville.

Upon being satisfied that a proposed Special Development is appropriate for the Town of Wolfville, Council in approving the proposal, will require that the owner of the land will enter into an agreement with Council pursuant to Section 34(1) of the Planning Act. The conditions of the agreement will not be inconsistent with the policies of the Municipal Development Plan and may regulate any of the following:

i) landscaping and natural or artificial buffering;

ii) architectural design, character, and external appearance of buildings and structures so as to:

  a) be compatible with the surrounding neighbourhood;

  b) protect any streetscape of historic significance;

  c) maintain a scale appropriate for the neighbourhood and Town;

  d) ensure adequate fire and police protection measures;

  e) provide for the needs and/or special requirements of potential users or occupants of the lands or buildings (e.g. the handicapped, elderly, very young);

iii) any matter which may be addressed in

> a zoning by-law (Section 33(2)(a) of the Planning Act)
>
> iv) access, traffic circulation and parking provisions;
>
> v) method(s) and provision of solid waste and effluent disposal;
>
> vi) water consumption;
>
> vii) the time period during which construction or implementation of the development shall be commenced and completed;
>
> viii) requirements for snow removal;
>
> ix) such other matters as may be deemed necessary by the Council of the Town of Wolfville.
>
> A detailed site plan, architectural drawings and design specifications shall be submitted by the developer and be part of the agreement and conditions for the carrying out of the Special Development and these plans, drawings and specifications will be contained in and form part of the agreement. No deviation from the drawings, plan or specifications shall be permitted except by mutual agreement between the parties to the agreement or until the agreement or part thereof is discharged by the Town of Wolfville. Upon discharge, the provisions of the zoning by-law will take effect.
>
> It is the intention of Council to seek planning advice upon the receipt of an application for any Special Development and to obtain legal advice prior to drafting and/or entering into any agreement for a Special Development."

Mr. Morrison said a development agreement was needed in this instance because the amount of land involved exceeded 5000 sq. metres and the development cost exceeded $500,000.00.

Mr. Morrison said that Section 20.2(ii)(a) and (c) of the M.P.S. provides that Council "may regulate" the design, character and external appearances of buildings but this does not mean that the plan requires Council to regulate these matters. In any event, Mr. Morrison said the proposed development is compatible with the surrounding neighbourhood because both the subject site and the surrounding properties will contain residential uses. Also he said the scale of the apartment buildings is similar to many other apartment buildings in the area and the number of units within the density permitted by the Land-use By-law for an R-2 Zone.

Mr. Morrison stated that Section 20.2(a)(ii) to (j) set out the criteria to guide Council in determining the appropriateness of a development proposal. According to Mr. Morrison it is a well known fact there is a shortage of apartment units in the Town of Wolfville. He said the development will increase the Town's assessment by approximately $1,000,000.00 which will advance the interest of all the residents in the Town. As Director of Public Works, Mr. Morrison said that facilities in the area are adequate to serve the proposed development and all costs of installing water lines, storm sewer, sewage and roads to the site will be borne by the developer. The construction of a cul-de-sac is provided for in the Town's subdivision regulations and is common in developing isolated land parcels said Mr. Morrison. According to Mr. Morrison, all specifications for the cul-de-sac including the turning radius comply with the requirements of Sections 20 and 21 of the Town's Subdivision Regulations dealing with cul-de-sacs. He further said the agreement requires 1.25 parking spaces per dwelling space which complies with the requirements of Part 5, Section 24(c) of the Land-Use By-law. Mr. Morrison said that thirty of the thirty-six units will be one-bedroom units.

According to Mr. Morrison the site drains naturally towards Highway 101 and any land "usually covered by water or marsh" is on the Department of Transportation property and not on the subject site. He referred to Section 10(a) of the proposed agreement which specifies the drainage will be towards Highway 101. According to Mr. Morrison, the subject site is not shown on the Town's Hazard Map and he does not see how the development will pose a pollution risk.

Mr. Morrison said there is sufficient water volume available to service this area for domestic purposes and for fire protection purposes. In his opinion water pressure in existing homes will not be affected by the development of two apartment buildings.

Mr. Morrison stated that Section 2 of the Town's Subdivision By-law requires a developer to reserve to the Town 5% of the land for open space purposes when the land being developed exceeds 10,000 sq. metres. Mr. Morrison said that the land being developed in this case is less than 10,000 sq. metres and Council did not feel it could demand an open space requirement.

Mr. Morrison said that lots 6 to 11 referred to by Mr. MacNeil and Mr. Behiels on plans shown them by real estate agents have never been approved by the Town of Wolfville as subdivided lots.

Mr. Morrison also referred to Section 20.3 of Policy 11 of the M.P.S. which deals with the Land-Use By-law. Section 20.3(1) reads as follows:

> "The future land use map included in this plan graphically portrays Council's intent concerning future development in the Town. Initially, the zoning by-law will recognize existing compatible uses and also zone those areas where development according to plan policies is anticipated or to be encouraged in the immediate future. Large undeveloped land areas will be zoned for agriculture until development is foreseen."

Section 20.3(iii)(a), (b) and (c) reads as follows:

> "More specifically, regarding zoning and amendment for residential uses:
>
> a) Council intends to advance the most economic utilization of land(s) consistent with preserving social amenity and the maintenance of reasonable standards of buildings and aesthetic quality.
>
> b) Council intends that one residential zone should be reserved for single family dwellings (R-1) and that the use of lands within this zone be rigorously controlled in order to preserve the amenity for such residential purposes. The maximum extent of R-1 lands in the Town of Wolfville when fully developed will approximate to 25% of all lands designated for residential purposes.
>
> Generally, in order to maintain the integrity of R-1 zones existing at the adoption of this plan, lands adjacent or immediately contiguous to the existing R-1 zones will not be rezoned to other than an R-1 zone excepting:
>
> i) to meet other plan policies; and
>
> ii) with consultation of the adjacent

> contiguous R-1 zone landholder.
>
> c) Apart from the exclusive single-family residential zone, all remaining residential development in the Town of Wolfville will be accommodated in one zone (R-2). It is the intent of Council to promote the use of R-2 zones in the broadest and most flexible manner compatible with the general statement of policy for residential zones stated above, part (a). In keeping with this, it is the Council's intent to promote the orderly in-filling of existing subdivisions but not to an extent that shortages of development sites may arise. Secondly, zoning for business and professional uses will only be considered secondary to Council's primary intent to maintain a pleasant residential living environment and a viable town centre."

Mr. Morrison said the subject site is designated residential on the Future Land-Use Map and is zoned R-2.

Dr. John Connor is the Town Planning Advisor. He was not subpoenaed by any party to the proceedings and was not available on the date of the hearing. With the agreement of the parties, Dr. Connor's memos to the Planning Advisory Committee and Council on the proposed development were filed with the Board.

The first memo is dated December 27, 1984, and it reads as follows:

> "DEVELOPMENT MEMORANDUM
>
> RE: BLOMIDON SUBDIVISION, RIVERVIEW AVENUE
> JOHN CROOKS
>
> 1. The original plan of subdivision for these lands was filed in 1967, amended in 1970, and it is now proposed by Mr. Crooks to amend again in order to allow the development of two apartment blocks of twenty units each. The land area (9,700 square metres) and the value of the development are such as to require a Special Development Agreement.

The proposed land use is in keeping with the future land use for the area and it is recommended that Council be advised to enter into a Development Agreement with Mr. Crooks, subject to confirming, clarifying or entering into a satisfactory arrangement pertaining to the following:

i) The Town's water service at this location will probably be at minimum pressure, perhaps as low as 20 psi. This should be brought to the developers attention with an advice to install appropriate equipment to boost water pressure in the buildings to be developed, water and sewer lines will have to be extended from Sunset Drive to the development;

ii) The development of a satisfactory sewer to service lot 2 could present difficulties due to a lack of gradient;

iii) Satisfactory arrangements for the disposal of storm waters should be submitted;

iv) A fire hydrant will be required;

v) Each block should be provided with paved parking facilities for at least 25 vehicles and adequate lighting for these areas is desirable;

vi) It is recommended that the 5% open space requirement be foregone on the understanding that each block be provided with a well equipped children's play area with capacity for at least twelve (12) children or a common area suitably located between the blocks with capacity for at least twenty-five children;

vii) The costs of the formal procedures and advertising for the agreement would be a charge to the developer;

viii) All of the Bylaws and Regulations governing development in Wolfville will be satisfied;

ix) The development will be started not later than 31 August 1985 and completed

> not later than 31 December 1987;
>
> x) A satisfactory security for performance in an amount of 25% of the value of the development will be lodged with Council before a development permit will be issued.
>
> xi) The foregoing has been prepared on the basis of information readily available. Nothing in the above shall preclude Council from adding, deleting or amending the requirements in advance of the formal completion of a development agreement."

The second memo is dated January 9, 1985, and it reads as follows:

> "PLANNING MEMORANDUM
>
> RE: SUBDIVISION AMENDMENT AND DEVELOPMENT BLOMIDON SUBDIVISION - MR. JOHN CROOKS
>
> The Chairman of the Planning Advisory Committee, the Development Officer, and the Planning Advisor met with Mr. Crooks on December 28 and discussed the Planning Advisor's December 27 Memorandum (attached) informally. Subsequently the Development Officer advised the Chairman of the Public Works Committee regarding a request to reduce the turning circle radius to 16.5 metres from the required 20 metres (see attached copy). By letter of 7th January 1985 Mr. Crooks has listed eight specific comments or requests pertaining to the proposed development. It is understood that Mr. Crooks intends to be present to discuss these and other matters at the Planning Advisory Committee meeting of 10th january 1985.
>
> PRELIMINARY APPRECIATION
> The proposal is in keeping with the approved uses of the subject lands. Every effort should be made to facilitate the development provided reasonable quality standards we maintained and the best interests of the town of Wolfville are upheld."

The third memo is dated January 14, 1985, and it reads as follows:

"DEVELOPMENT MEMORANDUM

RE: BLOMIDON SUBDIVISION AMENDMENT AND DEVELOPMENT - MR. JOHN CROOKS

1. Discussions have taken place with Mr. John Crooks with a view to amending the plan of subdivision for the Blomidon Subdivision, as per attached diagram, and the development of two eighteen unit apartment blocks plus a single family dwelling on the lands.

2. The Planning Advisory Committee and planning staff have considered the proposal and recommend to Council the entering into a Special Development Agreement with Mr. Crooks providing for or requiring the following:

a) the proposed development will comprise two apartment blocks plus a single family dwelling, the development to begin not later than 31st August 1985 and to be completed on a phased basis not later than 31st December 1989; see attached diagram;

b) before development begins the developer will lodge with the Council of the Town of Wolfville a satisfactory security for the completion of the development in an amount of 25% of the estimated value of the development. The determination of a satisfactory security to be at the absolute discretion of the Council;

c) the maps diagrams and plans attached to this memorandum shall form part of the agreement;

d) each eighteen unit apartment unit will be provided with fully prepared parking areas to accommodate at least 23 vehicles;

e) the Town of Wolfville will forego the requirements for open space under the Subdivision By-law;

f) the developer will be responsible for the installation of all roads and services to required specifications;

> g) the costs of all formal procedures, documentation and advertising will be borne by the developer;
>
> h) all laws, bylaws, regulations and/or standards pertaining to development in the Town of Wolfville will be satisfied except as may be specifically provided in the agreement;
>
> i) nothing in the above shall preclude Council and/or the developer from adding, deleting, or amending the terms of the agreement in advance of the formal completion of the Special Development Agreement."

Written submissions were filed by the Appellants on June 21, 1985, and by Counsel for the Town on June 24, 1985. Counsel for the Developer filed a brief prior to the hearing and did not file a post-hearing brief.

The Appellants submit that Council is obliged by the Municipal Planning Strategy to exercise discretion and judgment in dealing with special development proposals in R-2 zones. They argue that it is not the intent of the M.P.S. to leave the regulation of development in R-2 zones strictly to compliance with the requirements of the Land-Use By-law. The Appellants argue that Council was wrong to accept the advice of their Planning Advisor that Council had absolutely no discretion in approving development proposals regarding apartment dwellings in R-2 Zones and were obliged to support the proposal because the proposed use was permitted by the Land-Use By-law. The Appellants in their brief cited several cases where Council exercised discretion when dealing with special development proposals in other parts of the Town.

The Appellants submit that Council showed bad faith towards the residents of the Blomidon Subdivision by not following the original plan for the Subdivision as shown on Exhibits B-10 and B-11 which indicated the site would be developed with single family lots.

The Appellants also submit that the proposed development is not compatible with or of a scale appropriate for the immediate neighbourhood contrary to Section 20.2(ii)(a) and (c) of Policy 11. They argue the development will change the nature and character of the subdivision from a small single family subdivision which contains six single family lots and one building with six apartment units to a situation where apartment units will outnumber single family units 42 to 7.

The Appellants further submit that Council "in its haste to approve the development proposal, has neglected to conduct the essential detailed examinations of all the factors outlined under Section 20.2 and 20.3". They argue that the Town should have been "more rigorous in its demand on the developer to provide specific information and studies" concerning:

a) the impact on the quality of life of a small single family subdivision of locating two large apartments designed essentially to accommodate university students;

b) the problems associated with greatly increased traffic flow and parking in a cul-de-sac, not only with regard to the danger aspect related to the absence of sidewalks and parking areas for vehicles belonging to visitors to the apartments but also because the cul-de-sac is given the lowest priority for ploughing in the winter months;

c) the drainage plain and its possible effects on the existing drainage system all along Gaspereau Avenue;

d) The hydraulic conditions present on the property particularly with regard to the existence of natural springs;

e) The problems of a persistent low water pressure in the existing homes on Riverview and Sunset Drive and the effects of increasing the properties to be serviced by the same water supply by two apartment blocks containing 36 units;

f) The potential problems associated with adequate water supply for fire hoses should the services of the fire department be required;

g) The need for green space for

recreational purposes when there are no parks in the area.

The issue in this appeal is whether the proposed agreement is consistent with the intent of the Municipal Planning Strategy pursuant to Section 71(3) of the Planning Act, Statutes of Nova Scotia, 1983, c. 9.

Sections 20.3(iii) of Policy 11 of the Town's Municipal Planning Strategy quoted at page 23 of this decision provides the authorization for the establishment of residential zones in the Town. With respect to the R-2 Zone, Section 20.3(iii)(c) of Policy 11 of the Municipal Planning Strategy provides: "It is the intent of Council to promote the use of R-2 Zones in the broadest and most flexible manner compatible with the general statement of policy for residential zones stated above, Part (a)". Part (a) provides that "Council intends to advance the most economic utilization of Plan (s) consistent with preserving social amenity and the maintenance of reasonable standards of buildings and aesthetic quality". The subject site is located in an area zoned R-2. It is clear that the proposed use of the subject property is a use which is permitted under the R-2 zoning category for the property. Also the Future Land-Use Map which forms part of the Municipal Planning Strategy designates the future development of the site as residential.

A development agreement is required in this instance because the development is located on land exceeding 5,000 square metres and the development cost exceeds $500,000.00. The development is considered a special development proposal pursuant to the provisions of Section 20.2 of Policy 11.

The Council in evaluating the appropriateness of a special development proposal under Policy 11, Section 20.2 must consider the criteria outlined in paragraphs (a) to (j) of that Section quoted at page 18 of this decision. In the opinion of the Board, Council must make an informed assessment of these criteria and not an arbitrary assessment. Therefore, Council should be provided with information on the criteria outlined in paragraphs (a) to (j) of Section 20.2 to enable it to determine the appropriateness of the special development proposal and the procedures necessary to accomplish the development.

The Board is satisfied that Council did have information before it on which it could evaluate the appropriateness of the development in accordance with these guidelines. The Board notes that the Appellants have suggested that the development might have an impact on the natural environment of the site, might affect the delivery of water services and may cause possible flooding on Gaspereau Avenue. All these concerns were presented to Council at the public hearing called to consider the proposal. However, Council did have information that current water pressure although minimal was acceptable and that water pressure in existing single family dwellings would not be affected by the proposal. Mr. Morrison, the Director of Public Works, indicated the provision for drainage of the storm sewer towards Highway 101 was acceptable and that an existing marsh was on the Department of Transportation property and not part of the subject site. It was further pointed out that the Town would not be liable for any costs of the development as the developer was responsible for the cost of installing all services to the site in accordance with the specifications outlined in the Town's Land-use By-law and Subdivision By-law. Also, as pointed out by Counsel for the Town in his post-hearing brief, service delivery, traffic, access and parking matters were considered by Council and the agreement makes provision for the developer to comply with the requirements of the Town's Land-Use By-law and Subdivision By-law before a development permit is issued.

In the opinion of the Board, paragraphs (i) to (ix) of Policy 20.2 identify matters which Council may regulate by the agreement but this Section of the M.P.S. does not require Council to regulate these matters.

The Appellants were correct to point out that Council is obliged to consider whether the proposal conforms with the intent of the Municipal Planning Strategy but as pointed out by Counsel for the Town, Council does not have unfettered discretion to deal with development proposals in any manner they deem appropriate. Council is to be guided by the Municipal Planning Strategy in evaluating the proposed development. The Municipal Planning Strategy also requires Council to seek the advice of its Planning Officer and it is common practice for planning staff to evaluate a proposal and make a recommendation to Council. Whether Council accepts the advice of its staff is up to Council.

Although several of the Appellants purchased their property with the impression that the subject site would be developed with single family dwellings, these lands have never been subdivided into single family lots and there is no evidence that the Town represented to the Appellants that the site was subdivided into single family lots.

Council in deciding to approve this particular development has evaluated the relative weight to be given to the many criteria set out in the Municipal Planning Strategy. The Board recognizes that the proposed development will drastically change the nature and character of the Blomidon Subdivision but the Town's Municipal Planning Strategy and Land-Use By-law permit the location of apartment buildings on the site and Council has determined that the proposal conforms with the guidelines set out in Section 20.2(a) to (j) of Policy 11. Several residents of the Town and former members of the Planning Advisory Committee expressed concern that the Municipal Planning Strategy does not adequately protect the Town's residents from the impact of high density development. Greater control over the location and the effects of high density development is a matter which Council might wish to address when it undertakes a review of its Municipal Planning Strategy.

The Board's function is to hear the appeal, review the Municipal Planning Strategy and the proposed agreement and determine whether the agreement is consistent with the intent of the Municipal Planning Strategy. Section 71(5) of the Planning Act obliges the Board not to interfere with the decision of Council unless the decision cannot be said to be consistent with the intent of the Municipal Planning Strategy.

In the opinion of the Board, the Appellants have not discharged the onus on them of proving the agreement is not consistent with the intent of the Municipal Planning Strategy.

The Board has considered the evidence and the submissions of the parties, has visited the site and has reviewed the Municipal Planning Strategy, the Land-Use By-law, and the Subdivision By-law, and for the reasons stated, is satisfied the proposed agreement is consistent with the intent of the Municipal Planning Strategy. The Board therefore confirms the decision of Council pursuant to the provisions of Subsection (4)(a) of Section 71 of the Planning Act.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 23rd day of August, A.D., 1985.

Daryl Wilson

DARRYL W. WILSON, Member

NOVA SCOTIA MUNICIPAL BOARD.

Byrne v. District of West Hants

PLANNING--ZONING AMENDMENT--RR TO RM--SERVICE OF NOTICE OF APPEAL WITHIN TWENTY-ONE DAYS--LACK OF JURISDICTION--PLANNING ACT, SS.60(3), 63, 106

This is an appeal by K.B. from a decision of the Council of the Municipality of the District of West Hants rezoning approx. 1½ acres of land owned by R.S. from Restricted Residential (RR) Zone to Multiple Family Residential (RM) Zone. The Notice of Appeal was received by the Board on Aug. 8, 1985. The date of the publication of the advertisement by the Municipality of its decision to rezone was July 17, 1985.

HELD: The Board dismisses the appeal for lack of jurisdiction.

Section 63(2) of the Planning Act requires an appeal to be served on the Board within 21 days of the date of the publication by the Municipality of the advertisement of its decision. The advertisement was published on July 17, 1985 and the 21 days expired on Aug. 7, 1985. The Provincial Planning Appeal Board had, under the 1969 Planning Act, held that if the notice of appeal is received after the statutory period, it had no jurisdiction. The Supreme Court of Nova Scotia had upheld the Board's decision in that case. Since that decision a new Planning Act (1983) had been brought into force. It was argued that s.106 of that Act, which deems the receipt of documents "unless the contrary is proved", changed the effect of that decision. However the deeming provision in s.106 is inoperative where the date the document is received is clearly established or "is proved". This is the case at hand. The Notice of Appeal was received one day after the final date for service specified in s.63(2). As a result of the late service the Board lacks jurisdiction to hear the appeal on the merits.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **KEVIN BYRNE** from the decision of the Council of the Municipality of the District of West Hants made July 9, 1985, which rezoned lands of **REID SHANKS** at Three Mile Plains from Restricted Residential (RR) Zone to Multiple Family Residential (RM) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: PETER A. McINROY, LL.B, and MICHAEL MacKENZIE, LL.B, for the Appellant;

HAROLD G.S. ADAMS, LL.B, for the Municipality of the District of West Hants;

BARRY J. ALEXANDER, LL.B, for New Concept Housing Co-Operative Limited and South Central Nova Housing Association.

DECISION

This is an Appeal pursuant to Section 63(1)(a) of the Planning Act, S.N.S., 1983, c. 9, by **KEVIN BYRNE**, of Three Mile Plains, Hants County from the decision of the Council of the Municipality of the District of West Hants made July 9, 1985, which amended the Municipality's Land-Use By-Law by rezoning approximately 1½ acres of land owned by one Reid Shanks situate at Three Mile Plains in the Municipality of the District of West Hants from Restricted Residential (RR) Zone to Multiple Family Residential (RM)

Zone.

The Appellant's Notice of Appeal dated August 5, 1985, was signed by Peter A. McInroy, Solicitor for the Appellant, Kevin Byrne. The Notice of Appeal was mailed by Mr. McInroy's Secretary in Kentville, Kings County, Nova Scotia, on August 5, 1985, as appears from the Affidavit of Cindy Hemeon, Secretary to Mr. McInroy, sworn to on September 24, 1985, and filed with the Board as Exhibit K-3.

The original Notice of Appeal filed with the Board as Exhibit K-1 bears the receipt stamp of the Board dated August 8, 1985. The Board is satisfied that the Notice of Appeal was in fact received by the Board on Thursday, August 8, 1985.

A letter dated August 9, 1985, signed by the Vice-Chairman of the Board was sent to Mr. McInroy, Solicitor for the Appellant stating in part that "The Notice of Appeal is dated August 5, 1985, and the envelope containing it was postmarked August 5, 1985. However, the Notice of Appeal was not received by the Board until August 8, 1985". This letter also states that "An appeal made pursuant to Section 63 of the Planning Act must be served on the Board within twenty-one (21) days of the date of the publication of the advertisement required by Section 60(3) of the Act. It appears that this appeal may not have been served on the Board in time. The Board is awaiting confirmation of the date of advertisement of Council's decision from the Municipal Clerk."

The appeal was set down for hearing for Wednesday, September 25, 1985, and was duly advertised by the Clerk of the Board by three Notices of Hearing which appeared in the Hants Journal on September 4th, 11th, and 18th, 1985.

At the commencement of the hearing Counsel for New Concept Housing Co-Operative Limited and South Central Nova Housing Association and Counsel for the Municipality of the District of West Hants raised a preliminary objection to the Board's jurisdiction to hear the appeal on its merits based on the allegation that the Notice of Appeal was not received by the Board within the twenty-one day period set out in s.s.(2) of Section 63 of the Planning Act. S.S.(2) of Section 63 of the Planning Act reads as follows:

> "An appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the publcation of the advertisement required under subsection (3) of Section 60 or, in the case of a refusal to amend the land-use by-law, within twenty-one days of the date of the decision of the Council."

It is clear and agreed by Counsel for all parties represented at the hearing that the date of the publication of the advertisement by the Municipality required under s.s. (3) of Section 60 of the Planning Act was July 17, 1985. It is also clear and was agreed by Counsel for all parties represented at the hearing that twenty-one days from July 17, 1985, expired on August 7, 1985.

Oral argument was presented on the issue of whether the Notice of Appeal was served within the statutory period of twenty-one days from the date (July 17, 1985) that Notice of the Council's decision was advertised in a newspaper pursuant to s.s.(3) of Section 60 of the Planning Act.

Counsel for the Appellant pointed out that the Planning Act, S.N.S., 1983, c.9, in Section 106 sets forth certain provisions respecting the service of decisions or documents "required to be served" under the Act. Section 106 reads as follows:

> "(1) Any decision or other document required to be served under this Act may be served personally, by ordinary mail or by registered mail.
>
> Service by Mail
>
> (2) Unless the contrary is proved, any documents served by post shall be deemed to be served, delivered or received
>
> > a) where the delivery is local, on the third day following that upon which the letter, envelope or wrapper containing the document was posted; or
> >
> > b) where the delivery is not local, on the day the document would in the normal course of post be delivered,
>
> and in proving such service it shall be sufficient to prove that the letter, envelope or wrapper containing the document was properly addressed and mailed with the postage prepaid thereon."

Counsel for the Appellant then referred to the decision of the Provincial Planning Appeal Board (P.P.A. Board) in the Glow-Worm Investments Ltd., (Glow Worm) case.

He also referred to the decision of Burchell, J. of the Trial Division of the Supreme Court of Nova Scotia who dismissed the application of Glow-Worm for orders of certiorari and mandamus to quash the decision of the P.P.A. Board which had held that the Notice of Appeal by Glow-Worm which had been mailed in Truro to the Board's mailing address in Halifax was out of time. Reference was also made to the decision of the Appeal Division of the Supreme Court of Nova Scotia (S.C.A. No. 00723) which upheld the Board's decision that the Board had no jurisdiction to entertain the appeal because of the late filing of the Notice of Appeal.

At the time of the filing of the Notice of Appeal by Glow-Worm, the Planning Act, Statutes of Nova Scotia, 1969, c. 16, then in effect, made provision for a thirty-day period for appeal which expired on November 29, 1979. Glow-Worm's Notice of Appeal was mailed at Truro, addressed to the Board in Halifax. The Board received the Notice on December 6, 1979. MacKeigan, C.J. in delivering the decision of the Nova Scotia Court of Appeal stated that the provisions of Section 38(4) of the Planning Act, S.N.S., 1969, c. 16, as amended, "clearly requires that a Notice of Appeal be given to the Board, that is, be actually communicated to the Board in some way, within thirty days. This was not done". Counsel for Glow-Worm had given evidence before the P.P.A. Board that ordinary mail delivered to the Truro Post Office directed to Halifax would be delivered in Halifax the following day.

Counsel for the Appellant, Kevin Byrne, stated that if the provisions of the present Planning Act were the same as those in effect at the time of the Glow-Worm case then his client's Notice of Appeal would be clearly out of time. However, he argued that Section 106 of the 1983 Planning Act provides relief to the Appellant by deeming that a Notice of Appeal served by post was delivered or received in time by virtue of s.s.(2)(b) of Section 106. He tendered two Affidavits in support of his argument. The first one is the Affidavit of Kentville Barrister, Donald C. Fraser, sworn to on September 24, 1985, filed as Exhibit K-2. This Affidavit reads in part as follows:

> "1. THAT I practise law from an office in Kentville and that I both send and receive correspondence from my office to Halifax on a regular basis;
>
> 2. THAT in both sending and receiving items in the mail I find that mail service is such letters invariably arrive in Halifax the day after I mail them and that they arrive in my offices in Kentville the day after they are mailed in Halifax."

The second Affidavit filed as Exhibit K-3 was sworn to September 24, 1985, by Cindy Hemeon, Secretary to Mr. McInroy, Counsel for the appellant. It reads in part as follows:

> "1. THAT I have acted as Secretary to Peter A. McInroy, L.L.B. for the past seven years;
>
> 2. THAT I did, on the 5th of August, 1985, mail a Notice of Appeal to the Nova Scotia Municipal Board using an address from my address file which is:

Municipal Board,
1809 Barrington Street, Suite 510,
P.O. Box 1587,
HALIFAX, Nova Scotia B3J 2Y3.

3. THAT the envelope used would have been either a standard white business envelope size 4 inches by 9½ inches or a brown manila business envelope size 8½ inches by 11 inches;

4. THAT the envelope was processed through a postage meter and therefore would have received the proper postage."

Counsel for the Appellant, prior to the hearing had requested that the Clerk of the Board bring to the hearing the original envelope in which the Notice of Appeal was mailed. Unfortunately this was not possible as the envelope had not been retained by the Board.

Relying on the provisions of Section 106 of the Planning Act, Counsel for the Appellant argued that mail delivery from Kentville to Halifax is not "local" delivery and therefore the provisions of s.s.(2)(b) of Section 106 apply rather than s.s.(2)(a). The Board is satisfied that the envelope in question "was properly addressed and mailed with the postage prepaid thereon" in compliance with the provisions of s.s.(2) of Section 106.

Counsel for the Appellant argued that the Notice of Appeal was mailed on August 5, 1985, at Kentville and based on the Affidavit evidence of Donald C. Fraser delivery of mail from Kentville to Halifax takes one day and therefore the Notice in question is deemed to have been delivered to the Board on August 6, 1985 which is within the twenty-one day time limit for service under s.s.(2) of Section 63 of the Planning Act.

Counsel for the Appellant submits that Section 106 of the Planning Act is remedial in its nature and was included in the Planning Act as a result of the decision in the Glow-Worm case. He further submits that Section 106 is designed to provide a remedy or relief in a situation such as the one in which the Appellant finds himself.

Counsel for New Concept Housing Co-Operative Ltd. and South Central Nova Housing Association (purchasers of the subject property from Reid Shanks under agreement of sale) argued that the Board should not accept the evidence of Mr. Donald C. Fraser and Cindy Hemeon because they were not present at the hearing and were therefore not available for cross-examination. Furthermore, he argued that Mr. Fraser's evidence that letters sent by him from Kentville to Halifax invariably arrive in Halifax the day after they were mailed in Kentville is hearsay evidence and should not be accepted by the Board.

He also argued that the deeming provisions of Section 106 of the Planning Act only come into effect if it has not been proved that delivery or receipt of the document actually occurred at a different date. He argued that the words "unless the contrary is proved" in s.s.(2) must have meaning and in this case since the Board received the Notice in question on August 8, 1985, then the contrary is proved and the Appellant is not entitled to rely on the deeming provisions of s.s.(2).

The Board does not give much weight to the argument that the deponents of the two Affidavits were not actually available for cross-examination at the hearing.

Counsel for New Concept Housing and for the Municipality could have filed Affidavits in rebuttal or an application could have been made to adjourn the proceedings to allow time to subpoena the deponents of the two Affidavits for examination.

Counsel for the Municipality re-iterated the arguments advanced by Counsel for New Concept Housing et al and submits that the Board lacks jurisdiction to hear the appeal on the merits because the Notice of Appeal was not served on the Board within the prescribed twenty-one days.

Whether Section 106 of the Planning Act, Statutes of Nova Scotia 1983, c. 9, was enacted as the direct result of the Glow-Worm decision as alleged by Counsel for the Appellant is not relevant to the issue at hand. Section 106 is in effect and the Board is obliged to interpret its meaning in the light of the facts in this appeal.

It is my opinion that the words "unless the contrary is proved", which appear in s.s.(2) of Section 106 of the Planning Act must be given their ordinary meaning in the context of the entire subsection. It is my view that these words were included to make the deeming provisions of s.s.(2) inoperative in the situation where the date of the document served, delivered or received is clearly established or "is proved" which is the case at hand. Since the Notice of Appeal was actually received by the Board on August 8, 1985, one day after the final date (August 7, 1985) for filing an appeal under Section 63 of the Planning Act, the deeming provisions of s.s.(2) of Section 106 simply have no application.

The Board therefore finds that the Appellant's Notice of Appeal was served on the Board after the twenty-one day appeal period set forth in Section 63, s.s.(2) of the Planning Act had expired. As a result of the late service of the Notice of Appeal the Board lacks jurisdiction to hear the appeal on the merits.

For the reasons stated the Board dismisses the appeal for lack of jurisdiction.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of October, A.D., 1985.

RHBlois

R.H. BLOIS, Q.C.,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Fournier et al. v. County of Halifax

PLANNING--ZONING AMENDMENT--STANDING AS AGGRIEVED PERSONS--AUTO REPAIR AND TRUCKING BUSINESS--REASONABLY CARRIES OUT INTENT OF M.P.S.--PLANNING ACT, SS. 63(1),(3),(4),(5), 71(3),(5)--TIMBERLEA/LAKESIDE/BEECHVILLE M.P.S. INTRODUCTION, SECTION 2 ENVIRONMENTAL HEALTH SERVICES, POLICIES P-13, P-19, P-20, P-23, P-36, P-83, P-85, P-86, P-88, P-89, P-90, P-93, P-94

This is an appeal from a decision of the Council of the Municipality of the County of Halifax amending the Land Use By-law for Timberlea/Lakeside/Beechville by deleting from Appendix "D" "Conrad's Auto Repair Shop, 2999 Bay Road, 693939" and adding to Appendix "B" immediately after the last business activity listed "Conrad's Auto Repair and Trucking Shop, 2999 Bay Road, 593771". This had the effect of permitting Council to consider an expansion to Conrad's Auto Repair and Trucking business by development agreement. The subject site is within the Timberlea/Lakeside/Beechville Municipal Planning Strategy (M.P.S.) and is zoned R-1. In recent years the major uses of the property have not been R-1 uses; an autobody shop, a salvage yard and a trucking business have all been carried on over the subject land.

HELD: The Board allows the appeal of the qualified Appellants by reversing the decision of the Council amending the Land-Use By-law.

The Board has sufficient evidence and information to qualify several of the Appellants as aggrieved persons following the tests outlined by the Board in Riverlake and Benedict. The Board has no evidence with respect to several Appellants and so they have no standing.

Under s.63 of the Planning Act the Board's duty is to determine whether the decision of Council reasonably carries out the intent of the M.P.S. The Board is instructed not to allow the appeal unless the Board determines the decision cannot reasonably be said to carry out the intent of the M.P.S. On the Future Land-Use Map in the M.P.S. the subject land is designated residential. The subject land has been used in ways that are either non-conforming or illegal. The main thrust of the land-use by-law amendment is to legalize Mr. Conrad's trucking business and to permit its expansion under a development agreement. Can Mr. Conrad's property be added to Appendix "B" of the Land-Use By-law without an amendment to the M.P.S.? Policy 36 and Policy 88(i)(c) of the M.P.S. both incorporate by reference Appendix "B" of the Land-Use By-law into the M.P.S. In the view of the Board an amendment to the M.P.S. was necessary to preceed (or at least accompany) the Land-Use By-law change here attempted. The amendment to the by-law was made contrary to the intent of Policy 36 of the M.P.S. Also the expansion of Mr. Conrad's business would cause an increase in truck traffic and so would militate against the thrust of P-13. Mr. Conrad's use clearly is not a compatible use with the surrounding residential uses and so fails to conform with the statement on p.30 of the M.P.S. that residential designation is intended to protect low density residential development as well as to encourage a housing mix and other compatible uses. It also violates P-23 and P-36. The Board disagrees with the submission on behalf of the Municipality that the amendment is the only solution to the serious land-use conflict the exists. Policy 94 of the M.P.S. spells out a duty of Council "to support the M.D.P. [now the M.P.S.] by fully enforcing the By-laws". This Council has not done in this case. It is clear Council has acted by acquiescing in violations of the By-law. Council appeased the offender by trying to give him a preferred status under the land-use by-law and has acted in contravention of its own M.P.S.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, c. 9, Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal to the Nova Scotia Municipal Board;

- and -

IN THE MATTER OF: An Appeal by **ROBERT FOURNIER, ANNE FOURNIER, GORDON FUDGE, THERESA FUDGE, GEORGE BROWN, LINDA BROWN, GRANT GERLITZ, DOREEN GERLITZ, HAROLD BOUTILIER, MARION BOUTILIER, JAMES GOODWIN** and **CAROLYN GOODWIN** from the decision of the Council of the Municipality of the County of Halifax made February 5, 1985, to amend the Land-Use By-law for Timberlea/Lakeside/Beechville by deleting from Appendix "D" "Conrad's Auto Repair Shop, 2999 Bay Road, 693939" and by adding after the last business activity listed under Appendix "B" the following: Conrad's Auto Repair and Trucking Shop, 2999 Bay Road, 593771.

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member
RICHARD L. WELDON, Member.

COUNSEL: ROBERT CRAGG, LL.B., for the Municipality of the County of Halifax;

MRS. ANNE FOURNIER, acting on behalf of herself and all the other Appellants;

CHARLES CONRAD JR., the Applicant,appearing in person.

DECISION

This is an appeal commenced under Section 63(1) of the Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, by **ROBERT FOURNIER, ANNE FOURNIER, GORDON FUDGE, THERESA FUDGE, GEORGE BROWN, LINDA BROWN, GRANT GERLITZ, HAROLD BOUTILIER, MARION BOUTILIER, JAMES GOODWIN** and **CAROLYN GOODWIN** as signatory Appellants in a Notice of Appeal dated February 25, 1985. The Appellants appealed from the decision of the Council of the Municipality of the County of Halifax, made the 5th day of February, 1985, which decision amended the Land-Use By-law for Timberlea/Lakeside/Beechville as follows as set out in the Notice of Appeal:

> "1. By deleting from Appendix "D" the following: Conrad's Auto Repair Shop, 2999 Bay Road, 693939; and,
>
> 2. By adding immediately after the last business activity listed under Appendix "B" the following: Conrad's Auto Repair and Trucking Shop, 2999 Bay Road, 593771.
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> **NOTE**: The effect of the above-noted amendments will be to permit Council to consider an expansion to Conrad's Auto Repair and Trucking business by development agreement."

The Planning Act Sections cited in the Appellants' Notice of Appeal are not the sections relating to an appeal from a decision of Council amending its Land-Use By-law. The Notice of Appeal says further:

> "The grounds for this appeal are:
>
> 1. The decision cannot reasonably be said to carry out the intent of the Municipal Development Plan for Timberlea/Lakeside/Beechville (P-89); the decision contravenes Zoning By-law for properties located within the residential designation.
>
> 2. And such other grounds as may arise from testimony presented before the Nova Scotia Municipal Board."

and those grounds allow the Board to ascertain that the Appellants wish to pursue an appeal under Section 63 of the Planning Act. With the active consent of Robert Cragg, Counsel for the Municipality, the acquiescence of Mr. Charles Conrad Jr., and on the suggestion of Mrs. Fournier who acted as spokesperson for the Appellants, the Board determines that the Notice of Appeal is adequate for purposes of the appeal notwithstanding its specific reference to Sections 38, 51, 55 and 60 of the Planning Act (which have nothing specifically to do with appeals) and the absence of any reference to Section 63 of that same Act which relates to an appeal from a Council decision concerning amendments to Land-Use By-laws.

By viva voce evidence, Mrs. Fournier proved service of the Notice of Appeal (in accordance with Section 63(2) of the Planning Act), proved notification of commencement of proceedings on the parties pursuant to Section 27(2) of the Municipal Board Act and service of the Notice of Hearing as provided for by Rule 8(4) of the Board's "Rules of Practice and Procedure Respecting Appeals under the Planning Act" (hereinafter called "Rules").

In giving such evidence Mrs. Fournier proved service on the following: the Applicant, the Municipality of the County of Halifax; the Minister; the assessed owner of the land; the solicitor for the Municipality; Ronald Simpson, Provincial Director of Planning; and all the assessed owners within 500 feet of the site. The Board, as well as preparing the Notice of Hearing, arranged for newspaper advertisement of the Notice of Hearing in the Halifax Mail-Star, a newspaper published in the County of Halifax for insertion on April 17, 1985, April 24, 1985, and May 1, 1985.

Mrs. Fournier proved these advertisements of Notice of Hearing by providing the relevant tear sheets from the Halifax Mail Star. Mrs. Fournier explained that in order to ensure the required service of the Notice of Hearing she caused copies of that Notice to be delivered personally to all occupants of land within 800 feet of the subject property. She ascertained the number and address of the assessed owners within 500 feet of the subject property and served them Notices of Hearing by mail or by hand. She corroborates the mailing by providing an exhibited receipt of postage from the Timberlea Post Office dated April 15, 1985.

In passing, and in view of the eventual conclusion of this appeal, (and in a case where a lay-Appellant has taken hold of the conduct of the proceedings of a joint appeal), it is worthy to note that Mrs. Fournier gave the required notices to all the other Appellants.

All parties present agree, and the Board finds, that Notice of Appeal was adequate and timely, that notification of the commencement of the appeal, and Notice of Hearing were properly served and that the Board has jurisdiction to hear this appeal as it did on May 8th and 9th, 1985 at the Municipal Council Chambers, 2750 Dutch Village Road, Halifax, commencing at 10:00 a.m., May 8, 1985.

There had been no timely pre-hearing circulation of documents among the parties and there was no pre-hearing conference. After hearing one day's evidence (the Board then sitting being made up of Elizabeth Lawrence, Vice-Chairman, Darryl W. Wilson, Member and Richard L. Weldon, Member) it became clear to the Vice-Chairman from the evidence (given and tendered for the first time on that day), that she had some connection with events leading up to the original zoning of the subject site. She declared a conflict of interest and withdrew from further participation in the hearing. The Chairman of the Board, and all parties before the Board, consented that Mr. Wilson and Mr. Weldon constitute a Board which could continue with the hearing of evidence in the appeal.

The first witness, the Appellant Mr. James Goodwin, testified that he was employed by the Department of Public Works, Electrical Engineering Division and had lived in Timberlea for the last 17 years. He lives in close proximity to "Conrad's lot". He said Conrad's lot (10,800 square feet) was located 8½ to 9 miles from Halifax on Highway No. 3 the old main road to Chester.

Mr. Goodwin introduced a map filed as Exhibit F-9 part of which showed diagramatically Lots G4A, G4B and G4D on a subdivision of property of Charles Conrad, Timberlea, Halifax County Nova Scotia. Mr. Goodwin identified the subject property ("Conrad's Lot") on this map as being a cross hatched coloured green lot (90' x 120') situate on the north boundary of the St. Margaret's Bay Road. He also identified the locations of other Appellants on the map in relation to the subject property. The property of the Appellant Fudge is located on the same side of the road immediately adjacent to the East of the subject property; the Fournier property is located immediately adjacent and to the East of the Fudge property and the property of the Appellant Boutilier, not actually shown on the map, somewhere to the East again of the Fournier property. The property of the Appellant Gerlitz is situated on the same side of the St. Margaret's Bay Road as the subject property, 3 lots west (369 feet plus or minus) by road from the Western boundary of the subject property. According to Mr. Goodwin, the properties of the Appellants Goodwin and Brown are on the South side of the St. Margaret's Bay Road opposite the land lying between the southwardly straight line prolongations of the Eastern boundary of the Gerlitz lot and the Western boundary of the subject property. Thus the lands of all the Appellants are in close proximity to the subject lands.

There are no municipal water and sewer services for the subject property. Mr. Goodwin felt the building on the Conrad lot covered approximately 65 to 70% of the lot. He said the lot was too small to accomodate the business currently being conducted on the subject lot and therefore was not adequate to take any expansion of business use. He said an expansion of Mr. Conrad's trucking business would increase traffic generated from the Conrad lot, which was alleged a problem, and would create greater traffic problems. In Mr. Goodwin's opinion, the value of his own property in Timberlea was adversely affected by the amendment to the Land-Use By-law which changed the status of the subject property.

Valerie Spencer, testifying under subpoena, said that she is the Manager of the Policy Division of the Department of Planning and Development of the Municipality of the County of Halifax. Mr. Conrad Jr. had come to her seeking a solution to a business problem arising from his use of the subject property. She explained to Mr. Conrad that he required at least a rezoning in an attempt to solve his problem and that it would take several months to process a rezoning application. She advised him to approach the Planning Advisory Committee (P.A.C.) of Council directly in an attempt to have Council consider his rezoning application in a time frame more suited to his needs.

She summarized normal procedure for amendments to the Land-Use By-law as follows:

1. A letter of request from the person seeking the rezoning stating what was now in the By-law, what was wanted to be changed, and why.
2. The specific property to be rezoned and the description of that property.
3. Deposit for advertising the public hearing.

She said that ordinarily there would be a review of the application by staff and staff site views would be undertaken. There would be information given by the area Councillor: various agencies of government would be contacted. A report would be prepared by staff recommending approval (or not recommending approval) and this report would be tendered to the Planning Advisory Committee. P.A.C. would then make a recommendation to Council.

Ms. Spencer said the ordinary review process outlined would take a four month period and sometimes people needed action in a shorter time. The process here used to speed up Conrad's rezoning was not unusual and is the only way to speed up a rezoning application according to Ms. Spencer.

On December 28, 1984, P.A.C. by resolution stated in part: "Staff be directed to explore the situation with a view to determining the long-term resolution...That it report back to the Committee on Monday, January 7, 1985...Mr. Conrad be kept advised with respect to options and alternatives...". Given this short lead time staff provided a special report consisting of four pages and which states in part:

> "Introduction
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> On December 28, 1984, Mr. Charles Conrad appeared before PAC to discuss the use of his property in Timberlea. Mr. Conrad had recently applied for a development permit to erect a temporary structure in which he could keep four salt trucks. This structure was to have been an addition to an existing auto body shop on the property (see attached map). However, since the auto body establishment is permitted only to the extent

that it existed when the plan and by-law were adopted, no expansion to the building is permitted. Mr. Conrad subsequently applied for and was granted a development permit for a garage to be located on an adjacent property which he also owns. This garage would be an accessory building to the presently existing apartment building and the area land use by-law would permit one truck to be located there. Mr. Conrad stated that the second property is not where he wants to construct his truck shelter since he would prefer to keep his business interests close together and asked Planning Advisory Committee to provide him with a remedy to his problem. Planning Advisory Committee in turn has directed staff to prepare a report which outlines the alternatives by which Mr. Conrad's request might be accommodated.

It is the opinion of this report that under the existing land use by-law there is no short-term solution by which Mr. Conrad would be eligible to receive a development permit in order to construct a building in which to park four commercial salt trucks. Attention will, therefore, be focussed upon longer term alternatives which would require amendment of the planning strategy and/or land use by-law. In this respect, it is recommended that the plan and by-law already provide the most suitable option and that no further alterations (sic) be pursued.

.....

Conclusion

Five alternative courses of action have been outlined by which Mr. Conrad's request might be accommodated, none of which could become effective in less than two to three months. One of the difficulties in evaluating the request is that it is somewhat unclear what is being requested. The immediate request is for the ability to provide a shelter for four salt trucks. However, Mr. Conrad has indicated that should this business be successful he may wish to expand it. He has also indicated that he would like to have the ability to use his property for other business opportunities which might present themselves.

> It is recommended that, in view of the fact that the plan and by-law already provide an avenue by which Council may consider expansion and alteration of individual businesses in the area, no further amendment be considered.
>
> Mr. Conrad is within his rights to apply for a by-law amendment at which time a staff recommendation regarding the applicability of the plan's criteria to this property would be prepared."

As to adding Conrad's commercial property to Appendix "B" (which Council eventually did) the report states: "Without a complete site investigation staff cannot make a recommendation on this item".

This report was presented to the P.A.C. at its meeting of January 7, 1985. Disregarding the advice of its planners, the P.A.C. carried a motion as follows:

> "A SUPPLEMENTARY REPORT BE FORWARDED TO COUNCIL FOR THE JANUARY 8, 1985 COUNCIL SESSION, RECOMMENDING TO COUNCIL AN AMENDMENT TO THE TIMBERLEA/LAKESIDE/ BEECHVILLE LAND-USE BY-LAW IN ORDER TO ALLOW MR. CONRAD TO OPERATE HIS BUSINESS WITHOUT AN AMENDMENT TO THE MUNICIPAL PLANNING STRATEGY. A SUGGESTED DATE FOR THE PUBLIC HEARING IS FEBRUARY 5, 1985, DURING THE REGULAR COUNCIL SESSION."

Staff and Municipal Solicitor were instructed to consult on wording of the proposed changes. The Municipality would bear the cost of the advertisement.

In an undated supplementary report from staff appears the following sentence "Staff advise that an Affidavit should be required from Mr. Conrad if Council wishes to pursue this avenue."

The January 8, 1985, report of P.A.C. suggested the changes to the Land-use By-law (and a proposed development agreement with Mr. Conrad) be dealt with at the same Council meeting.

The P.A.C. on January 28, 1985, discussed the present rezoning application again and noted staff's comment concerning Mr. Conrad's non-cooperation in providing staff with necessary information requested of him.

A staff report to the P.A.C. on February 4, 1985, included a draft development agreement and the application for the development agreement was dealt with at the P.A.C. meeting of February 4, 1985.

On February 5, 1985, Council held its public hearing on the Conrad rezoning matter. The zoning amendment was passed and Council decided to postpone passage of the development agreement.

There was no on-site inspection of the subject property by staff.

In the opinion of Ms. Spencer, it was technically possible for Council to add Mr. Conrad's property to Appendix "B" of the Land-Use By-law if the business uses thereon meet the criteria of the plan.

Ms. Spencer referred to the Applicant's salt truck operation and mentioned the potential salt intrusion from this operation into the wells of nearby residential properties. She suggested that great care be taken in expanding business in this area because of the history of health problems. She said that these health problems had given rise to the demand for expensive services in the eastern sector (Lakeside and Beechville) of the planned area. She did not wish the same planning errors to be repeated in the unserviced Timberlea area. The fear of repeating the aforementioned Halifax County planning errors is, she said, the main underlying premise behind the Municipal Planning Strategy.

She said the plan strove to reduce a problem of too heavy truck traffic in the planned area particularly that generated by the Lakeside Industrial Park. She referred to Policies P-13 to P-21 of the M.P.S. inclusive which deals with the systems of transportation. She said Highway No. 3 is a winding road without sidewalks.

She said that increased rates of development would bring land use conflicts into sharper focus. In her view, the intent of Policy P-30 of the M.P.S. is to reduce land use conflicts. Under the M.P.S., Timberlea would continue to be developed as primarily residential.

On December 28, 1984, the staff was instructed by the P.A.C. to report on alternatives available to Council to allow Mr. Conrad's expansion. The report was delivered January 7, 1985. The P.A.C. met and recommended Council call a public hearing to hear Mr. Conrad's application for a rezoning and his application for a development agreement. Staff and the Municipal Solicitor sat down and drafted, in their views, appropriate means to approve both of these applications. According to the reports prepared by the

Planning Department, if the Council wished to approve both applications it could only proceed mechanically if it were to move Conrad's lot from Appendix "D" to Appendix "B" in the Land-Use By-law. She said that included in the M.P.S. criteria for approval of a development agreement is the criterion that the granting of a development agreement would further the intent of the Plan. Ms. Spencer said definitely she would not recommend amending the Land-Use By-law to allow the expansion of the business on the Conrad property as that expansion was contrary to the intent of the Plan. She said the existing salvage yard use was in conflict with the Plan and that she found problems with the scale of the total use of the site. On cross-examination, she felt Council should adhere to its plan. She said further that Council had powers to rectify the Land-use conflict other than by the process of development agreements. She said there could be charges laid for violations under the Planning Act and/or the Municipality's By-laws.

Ms. Spencer said in her opinion as a Planner, that Council's decision to add Mr. Conrad's property to Appendix "B" of the Land-Use By-law did not reasonably carry out the intent of the M.P.S.

Keith Michael Birch, 5 Linwood Drive, Halifax, is the Director of Planning and Development with the Municipality of the County of Halifax and he has held that position for 5 years. He is familiar with the Timberlea/Lakeside/Beechville Municipal Development Plan, at least as it affects the subject property. He said that prior to 1982, any person wishing to develop in Timberlea would have had to apply for a Regional Development Permit. The application would have been forwarded to the Director of Community Planning in the Department of Municipal Affairs. The Regional Development Permit would not have been issued by the Director until the County had issued a municipal building permit which would have been taken to be prima facie evidence that all the Municipal By-laws had been met. No building permit had been issued for the Conrad property and there had been no permit issued for a single family development on the Conrad's lot. He felt the existing land use conflicts caused by Conrad's use of his lot could be minimized by enforcement of the Municipality's by-laws and regulations. In his opinion, Conrad's lot had to be satisfactory, as to scale, for on-site use as a commercial and industrial enterprise. P.A.C. directed Mr. Birch's Department to prepare a land-use change by-law rezoning Resolution and also a development agreement to accommodate Charles Conrad Jr.'s needs without regard to staff's previous recommendation against the change in land-use by-law.

It is the position of Mr. Birch that the Council had the right to consider adding the subject property to Appendix "B" of the Land-Use By-law. Consequently he advised Council of the course of action subsequently taken as being procedurally appropriate. Council chose so to move. Any report of Mr. Birch's department was related to the procedural propriety of so doing and did not have regard to the planning merits of Conrad's "rezoning". He said, as a professional planner, he would not recommend Conrad's zoning change be allowed to stand since the uses on the property should not have been allowed to expand. He was fully of the opinion that the expansion of Conrad's permitted use of the land was not reasonable and Council's decision thereon didn't reasonably follow the intention of the M.P.S. He suggested in this Conrad case that he was acting solely as administrator. He didn't agree with P.A.C. and Council's decisions but he had no policy function to perform given the specificity of his instructions from the P.A.C. and from the Council. He was not asked to give an opinion on the planning advisability of the development agreement. He was told to prepare a draft agreement for consideration by Council. He felt that it would be necessary for the staff to visit Conrad's site to give a proper recommendation for or against the development agreement. He suggested that a building permit was required for Conrad's scheme. He would not recommend an expansion of business on the subject property. The 10,800 sq. ft. lot here was relatively too small for the amount of use already carried by it. Mr. Birch noted that Mr. Charles Conrad Jr. had already been fined for building on the subject lot without a permit. He said that the payment of the fine did not legitimize the building. In fact, the county had still the option to order the tearing down of Conrad's building. Mr. Birch's opinion is that Conrad's lot is in an unserviced area and the property is grossly over-developed. He alleged the following land-use conflicts:

1. expansion conflicts;
2. traffic conflicts;
3. conflicts with the type of use;
4. conflicts with the lot coverage;
5. conflicts with the generation of outdoor storage.

All these conflicts intrude upon the adjacent residential nature of the area.

He holds the opinion that there was serious land-use conflict on Conrad's site and that the "cure" for Conrad's problem would be consultation between the County's industrial development office and the present applicant. That would be the only real solution. He said that Mr. Conrad had no suitable solution available on this land to ease the existing land-use conflicts. The means proposed by Council to reduce this conflict would not achieve what they were intended to achieve, i.e. mitigation of the existing land-use conflicts.

Robert Fournier, an Appellant, Professor of Oceanography at Dalhousie University and resident of Timberlea testified. He lives on a 22-acre block of land off Fraser Lake which runs south from the lake to the Bay Road (Highway No. 3). He has lived there for 13 years within a short distance of Conrad's property. From 1976 until April 1982, he worked for the adoption of a Municipal Development Plan for the area. As a member of the Public Participation Committee, he worked on the preparation of the present M.P.S. for a period of a year to a year and a half. There were three communities in all serviced by this committee, Lakeside, Timberlea and Beechville. All segments of society were represented on this PPC.

He said all participants in the planning process for the area were highly concerned that there not be another muddle in planning such as had occurred in Spryfield or Sackville when water and services had been first provided in those communities. He said the Conrad property as a topic of concern, was more discussed before the PPC than any other single topic on the agenda. From a purely historical basis, Conrad's lot was dealt with as being an outstanding example of unsightly and unchecked growth. He said services came west to the Fraser Road and lands to the west of Fraser Road were unserviced. The subject lands are in the latter area.

He said there was a plea made before County Council at its meeting on the adoption of the Timberlea M.P.S. by Mr. Conrad and also by Jollimore Autobody that each be included in an Appendix "D" to the plan. The Council in its wisdom decided to remove these two properties from the non-conforming category and put them in Appendix "D". Council's intent was to allow rebuilding, if interruption in use occurred, but not to allow expansion in existing use or additional use on these two properties. By 1982 Conrad Trucking and Repair had an implicit expansion by virtue of the change in its name, and an explicit expansion in the size and level of activity on the lot in question. Trucking activity had increased radically and unsightliness had increased in direct proportion to increased use. Mr. Fournier said the subject site was now a salvage yard.

On cross-examination by Mr. Cragg, Counsel for the Municipality, Mr. Fournier said that the current uses of the subject land were illegal. He said that Council's changes to accommodate Mr. Conrad, at the present date, were in violation of the plan. He felt there should be no rights given by the development agreement that did not already exist.

Mr. Fournier felt he was an aggrieved person because:

1. He was within 500 feet of the Conrad lot;
2. There was a financial derogation to his own property because of the condition of the Conrad property;
3. He felt that he had little faith in the political process that had taken place to date as the Council had somehow overridden the wishes of the community as expressed by the Public Participation Committee;
4. He was not impressed with the County's

By-law enforcement efforts to date.

Mr. Fournier dealt with the enforcement of the Zoning By-laws by the County. He said the present use of the Conrad land was contrary to the entire thrust of the M.D.P.

Robert Gough of 18 Tower View Drive, Halifax is the Development Officer of the County of Halifax and Manager of the Development Division of the Department of Planning and Development for the Municipality of the County of Halifax, and he said he has been Development Officer since that office originated in or about 1971.

Both Ms. Spencer and Mr. Gough report to Mr. Birch, as their respective immediate superior.

In the course of his duties, he enforces the Municipality's Land-Use By-law and he is responsible for the administration and issuing of development permits. He testified there was no development permit issued on the Conrad property nor has he received an application to issue a development permit for the property. A development permit application and a building permit application flowing from the development permit application ordinarily would be processed at the same time. He said if the application for the development permit met the criteria of the Zoning By-law then he had no alternative but to issue a permit. If the application didn't meet those criteria he could only reject the application.

He said that a development permit would be issued by the Development Officer but a development agreement would have to be negotiated through Ms. Spencer's Policy Division, and through the process of an advertised public meeting held by Council.

He said that any development agreement would have to meet the intent of the Municipal Planning Strategy but he felt that any explanation of the proposed development agreement with Mr. Conrad was more in Ms. Spencer's field of expertise than in his own.

Mr. Gough said that prior to 1982 (he felt the area in question then was zoned either general or unzoned) there could not have been a salvage yard, nor a mobile home park, nor a dump permitted on the lot in question. The majority of other land uses would have been permissible. Since 1975, and until the advent of the current M.P.S., a Regional Development Permit was required for development of the Conrad lot.

Neither the County of Halifax nor Charles Conrad Jr., the Applicant, called any witnesses. Mrs. Fournier, for herself and all the other Appellants, Mr. Cragg, for the Municipality, and Charles Conrad Jr., for himself, all made argument.

Timberlea is a ribbon development of mixed use along Route 3, the older main route to the South Shore. The area had developed hodge podge style with on-site services and houses on roadside lots. Mr. Conrad Jr., the Applicant and Mr. Conrad Sr., (the assessed owner of the lot in question) were longtime (at least two generation) land owners and inhabitants of the area. They both apparently made their homes in Timberlea and Mr. Conrad Sr. at least, had some investment in apartments in the immediate vicinity. Mr. Conrad Sr. was the owner of the subject lot the status of which at the request of Mr. Conrad Jr., Council changed in an attempt to aid Charles Conrad Jr.'s business ventures.

The Board's perusal of the documentary records presented both by the Appellants and by the Municipality and the Board's sifting out of the viva voce evidence of all witnesses lead it to the conclusion that there has been proven to the Board's satisfaction the following:

> 1. That Charles Conrad Sr. owns the lot in question today and has so owned it continuously since the Servant Plan in 1961 (see Exhibit F-9)and probably before that.
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> 2. That Charles Conrad Jr. claims that his business(es) occupies the property today and has occupied it in these various or parallel ways as near as may be determined for all the times which are material before the Board as follows:
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> > a) Suncor Auto Sales and Services Ltd. (Circa Oct. 17, 1978, Oct. 31, 1978, Nov. 2, 1978, Dec. 12, 1978),
> >
> > b) Autosport Car Dealer (Sept. 11, 1981, Sept. 18, 1981),
> >
> > c) Autosport Import Sales Limited (Oct. 19, 1981),
> >
> > d) One Stop Auto Shop Ltd. (circa March 6, 1985),
> >
> > e) Charles Conrad Jr. (in his own name) - From at least July 22, 1981 up to and including the present. (This is indicated from the reading from the various exhibits

in F-8 from the statements made by the neighbours at the hearing).

These enumerated occupations would be either illegal or non-conforming uses (depending on the facts in each case) to the extent they did not fit under the Appendix "D" which reads as follows:

> "APPENDIX 'D': AUTOBODY SHOPS
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> Notwithstanding anything else in this By-law, the following existing autobody shops are deemed to be permitted uses to the extent to which they are in existence on the effective date of this By-law.

	CIVIC ADDRESS	LRIS INDEX NUMBER
Conrad's Auto Repair Shop	2999 Bay Road	693939
Jollimore's Autobody	2416 Bay Road	40162315"

The relevant provisions of the Planning Act relating to appeals from a decision of Council amending its Land-Use By-law are as follows:

> "63(1) The amendment, revision or refusal by a council to amend or revise the land-use by-law may be appealed by
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> (a) an aggrieved person;
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> (b) the applicant;
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> (c) the Director;
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> (d) the Council of an adjoining Municipality.
>
> 63(3) The Board shall determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy.
>
> 63(4) The Board may
>
> (a) confirm the decision of the Council;

> (b) allow the appeal by reversing the decision of the Council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the Council to amend the by-law in the manner prescribed by the Board.
>
> 63(5) The Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

The Board has had, on previous occasions, cause to consider the effects of these sections concerning the decisions of councils. The following are decisions under the Planning Act which followed appeals by Applicants from decisions of Councils (negative to the wishes to the applicants):

Oakdene Estates Limited - NSMB-459-84-P;

Tenwolde Brothers v. City of Dartmouth - NSMB-464-84-P;

Michael P. Nash - NSMB-450-84-P.

Wallace, MacDonald, Lively & Tolson - (NSMB-468-84-P), deals with similar tests under Section 71(3) and Section 71(5) of the Planning Act. A decision in which the Council's positive decision in favour of the Applicant was struck down may be found in Douglas Benedict v. the Town of Truro - NSMB-475-85-P. The Board is of the opinion that these cases give guidance in interpreting the statutes governing appeals from decisions of Council to the Municipal Board under the Planning Act.

The Municipality of the County of Halifax passed the Municipal Development Plan for Timberlea/Lakeside/Beechville (now the M.P.S.) which received Ministerial approval and became law October 20, 1982 together with a Zoning By-law (now Land-Use By-law) including Appendix "D".

Starting in December of 1984 and ending up in February, 1985, the Applicant succeeded in having the status of the land in question changed:

> 1. By removing the subject property from its listing under Appendix "D" (which is set out in full earlier in this decision) and
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> 2. Placing the subject property in Appendix "B" (in which it is set out in full in its unamended form subsequently in this decision) and
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> 3. Expanding the uses permitted by changing the name to "Conrad's Auto Repair and Trucking".

Under Section 63 of the Planning Act the Board's duty is to determine whether the decision of Council to amend its Land-Use By-law reasonably carries out the intent of the Municipal Planning Strategy. The Board is instructed not allow the appeal unless the Board determines the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.

Timberlea slowly developed as a ribbon development along the Bay Road with a varied mixture of land uses and development problems which problems were particularly acute in the communities to the east of Timberlea (Lakeside and Beechville), in that order. These problems were treated with a dose of installation of municipal sewer and water services at some considerable expense to all levels of government including a special subsidy from the Provincial

Government. Servicing of Lakeside & Beechville increased pressure to develop, with better planned development, the Timberlea area.

The increased pressure to develop, the inroads into the community of new people with different goals and life styles, and the natural resistance to change in human beings, drew into focus the difference between the "original" inhabitants and the "newcomers". These differences, unresolved at least to the present to the satisfaction of all, are probably the underlying cause of the Applicant's attitude to Municipal officials and to the law, and to Council's assent to his needs in 1982 and again in 1985. These unresolved differences also help us understand the resistance to the Applicant's behaviour by the Appellants and the attitudes of the present Appellants to the Applicant's behaviour.

County Council has tried to reduce this conflict of views between the applicant and the Appellants as to the expansion of the permitted uses on the subject property.

By adding the subject property to Appendix "B" of the Land-Use By-law, Council felt it would enable Mr. Conrad to expand his business while at the same time permitting Council to control that expansion through a development agreement.

From the evidence before the Board, Charles Conrad Sr. appears to be a non-active supporter of the business ventures of his son, Charles Conrad Jr. on the land in question. He is non-active in the sense that he supplies the land and ratifies whatever activity Charles Conrad Jr., in whatever guise, chooses to do with the property.

Again, from the evidence before the Board, Charles Conrad Jr. impresses the Board as being, to say the least, a free enterpriser in the extreme sense of the word. He has had problems with his use of the land since at least 1978. He put a building on the lot without a permit. He has used the lands as a salvage yard, without the required permits, both in the 1970's and in 1985. He has spilled the uses of the lot over the lot boundaries onto other lots which were also not appropriately zoned. He has been convicted of building on the subject lot without a permit. He has, since 1982, expanded upon any non-conforming use of the subject lands, or even conforming use, by being a salt truck operator which use has never been provided for under any rational interpretation of Appendix "D". He has not bothered to distinguish for Council (on the two occasions he has had help from it) just who and when and to what extent each person was occupying and using what part of the subject property and he has declined to do so in evidence before this Board. Charles Conrad Jr., on the evidence, seems to have the attitude of a free user of property which comes naturally from the rural isolation in which Timberlea earlier had found itself. In pre-planning times (pre-1946) in Nova Scotia, all his activities might have been legal.

The suburban residential emphases of the Appellants conflict with this approach of the Applicant. Mr. Fournier spent a great deal of time and effort in the initial planning process leading up to the present Municipal Development Plan. With his suburban residential outlook, he found it passing strange, but necessarily to be accepted, the way Council disregarded the P.P.C.'s two years' labour and yielded to a 10-minute presentation before Council in 1982 by Mr. Charles Conrad Jr. At that time, Council approved "Schedule D" trying thereby to turn Conrad's use of the subject land from a potential non-conforming use to a non-expansionary conforming use. Given Mr. Conrad Jr.'s behaviour in using the land between 1982 and December, 1984, Mr. Fournier at the hearing (and Mrs. Fournier according to Minutes of Council and its Committee put before the Board) found Council's decision in February, 1985, even more inexplicable. From the perspective of his 20-odd acre lot enclosing a single family home, Mr. Fournier can have perhaps a different view of Mr. Charles Conrad Jr.'s activity than had Council. Council seems to continue to support Mr. Conrad despite his activities. Council has been consistent in support of Mr. Conrad Jr.'s position from 1982 through to 1985.

This Board is concerned only with the Council's decision of February, 1985. Does that decision reasonably carry out the intent of the Municipal Planning Strategy? The Board will now proceed to look in some detail at the

Land-Use By-law and the Municipal Planning Strategy.

On the Future Land-Use Map, as appended to the Municipal Planning Strategy, the subject land is designated residential. On Schedule "A" to the Land-Use By-law it is zoned R-1 and has been so identified under oath by witnesses before the Board.

The uses recounted before this Board and, for that matter, before Council, clearly showed that in recent years the major uses, at least, have not been R-1 uses. An autobody shop, a salvage yard and a trucking business have all been carried on over the subject land. These facts are confirmed at the Board hearing, on the view of the site by the Board, on the documentary file tendered by the Appellants and by the other evidence of the Appellants. These uses, if they existed at the time of the original zoning by Council and to the extent not dealt with in Appendix "D", are either illegal, or non-conforming uses of the land as the case may be. The main thrust of the amendment of February 1985 was to legalize Mr. Conrad's Trucking Business and to permit its expansion under a development agreement. The development agreement and land-use amendment both were referred to Council. Approval of the development agreement was postponed and is not before this Board. The Zoning By-law amendment has been passed and is, in the course of this appeal, under review before this Board. A detailed study of the M.P.S. was made, by this Board and the Board first excerpts any portions of the plan that in its view appear to be pertinent to the present appeal.

The introduction of the M.P.S., (the Plan is before the Board as Exhibit F-5) at Page 1, cites the effort of the PPC in these words... "...Public Participation Committee of area residents...held prime responsibility of the success of general public input and participation throughout the process." This statement confirms most of the evidence given before this Board by Mr. Robert Fournier concerning the development of the plan over a two-year period leading up to Council's decision in April, 1982, to adopt the plan followed by Ministerial approval of the plan making it law in October, 1982.

At page 7 of this introduction there occurs the following recital:

> "The cost of Municipal Central Services to the communities provides a fundamental reason for encouraging future development to use these services. Conversely, previous experience with the environmental health problems of private servicing systems and septic tanks and wells demands a greater measure of development control in areas not to be provided with municipal water and sewer."

There is no in evidence before this Board of a plan to provide the subject lands with Municipal water and sewer. Again, community problems were identified at Page 9 of the Introduction.

> "Foremost, the community has identified land use coflicts with existing commercial and industrial premises, particularly autobody shops, salvage yards and trucking operations. The increased application and enforcement of the Municipality's Unsightly Premises By-law has also been

> closely identified with several incompatible land uses."

The subject property is a 10,800 sq. ft. area of land and had and may still have an autobody shop, salvage yard and trucking operation. It is a very severe incompatible land-use conflict with the residential area surrounding it.

At page 11 of this Introduction, transportation problems are identified:

> "Local transporation problems include truck traffic generated by the Lakeside Industrial Park and other industrial sites, and poor road conditions primarily resulting from Highway No. 3 being the only collector for traffic within the communities. In response to general use of this highway by school children and other pedestrians, residents express a desire for sidewalks, particularly in conjunction with truck routes."

As late as 1985 when the Board viewed the site, there were no sidewalks in front of the property. There was evidence adduced showing an increase of truck traffic from this site which is near school bus stops and on a very winding section of the main road. The summary of the Introduction starting at page 11 is, in the opinion of the Board, worthy of quotation in full:

> "The Plan Area's development has been very much constrained by a combination of environmental health problems, site limitations and provincial development controls. With the introduction of the new municipal infrastructure, scheduled for completion in mid-1983, the Plan area is in an unique and opportune position. It will be the first urban area within the Municipality to have a development plan and a zoning by-law prior to the

> scale of development approaching that of other suburban communities.
>
> The major goal of this Plan is to prepare to accommodate major growth and transition in the immediate future, as well as to give direction to development in a manner consistent with overall community objectives."

Under Section II of the Plan headed Environmental Health Services at Page 15 is this statement:

> "As the secondary area in Timberlea is sparsely populated and local residents have been opposed to the extension of municipal services, any extension is unwarranted at the present."

According to Plan 2 forming part of the M.P.S. the subject lands fall within the "secondary area" in Timberlea and the extension of municipal services to the subject site is considered unwarranted at this time.

Positions on transportation are taken on Page 23 of the Plan:

> "Despite the limited jurisdiction of the Municipality in transportation matters, transportation remains a fundamental concern in recognition of the interdependence between transportation, land use and community development."

As a policy following this recognition of limited responsibility by the municipality over transportation, the Council enacted Policy P-13.

> "It shall be the intention of Council to request the Department of Transporation to designate Highway No. 3 in Beechville to the Lakeside Industrial park as a truck route in order to preclude the remaining portion of Highway No. 3 in the Plan Area being used for truck traffic."

In April, 1982, this was the goal of Council.

Whether or not that goal of designation has been achieved, that Policy, at all relevant times in 1984 and 1985 has not been changed. In respect to the subject property, this goal would indicate, at least, that no truck traffic increase be contemplated here.

Policy 19 has some relationship to the subject land.

> "P-19 Through the review of subdivision and general development proposals, it shall be the intention of Council, to encourage the consolidation of driveways and parking areas, as well as rationalized entrances and exits, for commercial uses along Highway No. 3.
>
> P-20 It shall be the intention of Council to support the installation of sidewalks on all streets leading to community facilities, most importantly to schools and recreational areas, and on all local arterial and collector streets."

Under the heading of "Land-Use Intent" on Page 30 we find the following statement: "The Residential Description is intended to protect low density residential development as well as to encourage a housing mix and other compatible uses." After various statements of intent, at page 34 we find Policy P-23:

> "Within the Residential Designation as shown on the Generalized Future Land-Use Map, (Map 1), it shall be the intention of Council to preserve the existing single unit dwelling residential environment with its associated institutional and open space uses."

At Page 39 and 40 of the Plan, there are statements of intent which bear very closely on the appeal before the Board.

> "Commercial and Industrial Uses in Residential Areas
>
> The road pattern and the absence of zoning controls have produced a mixture of residential, commercial and industrial uses along Highway No. 3. Some of this mix is incongruous with respect to traffic, noise, aesthetics, and suitable separation distances. Salvage yards within the Residential Designation are a primary example, being unlicenced and further, presenting the potential for increasing land use conflict as the area develops.
>
> The intent of the Plan is to minimize and where possible, resolve some of the most serious land use conflicts and to designate areas which are appropriate for such development. There remains however, a number of existing commercial and industrial uses located in residential areas, which do not involve serious land use conflicts.
>
> These uses are reasonable in terms of the services they provide, their acceptance to the community and their suitability to the immediate area in terms of scale and site."

The intention in the Plan is recognized by Policy P-36 followed by Appendix "B":

> "P-36 Notwithstanding Policy P-23, within the Residential Designation, it shall be the intention of Council to provide for the continued use of commercial and industrial properties identified in Appendix "B" of the Zoning By-law. Further, Council shall consider any proposed expansion of such uses according to the provisions of Section 33(2)(b) and 34 of the Planning Act. In considering any expansion proposal, Council shall have regard to the provisions of Policy P-89 as well as the capability of the site to accommodate the proposed expansion relative to adjacent residential uses and any increase or change in the intensity of use as result of the expansion which would prove hazardous or detrimental to adjacent uses".

Part IV Implementation has some sections worthy of mention. At page 72 is the following:

> "Council cannot take any action which would, in any manner, be inconsistent with the Plan or at variance with it."

At page 73 the Board finds provisions setting up internal regulations concerning changes in the Municipal Development Plan.

> "P-83 It shall be the intention of Council to require amendments to the policies and maps in this Municipal Development Plan under the following circumstances:
>
> (i) where any policy is to be changed;
>
> (ii) where a request for a zoning amendment is made and subsequent studies show that the policies of the Plan should be amended;
>
> (iii) where the boundaries of the Plan Area are altered to coincide with boundaries of future plan areas.
>
> Further Council may consider amendments where policies of Future Plan Areas conflict with policies of this Plan."

On the same page we find provisions for a five year review.

> "P-85 In accordance with Section 20 of the Planning Act, this Plan may be reviewed when the Minister of Municipal Affairs or Council deems it necessary but in any case not later than five years from the date its coming into force or from the date of the last review."

Development Agreements are dealt with under Policy P-86.

> "P-86 Providing that the intention of all other policies are satisfied, Council may, for the purpose of providing for the development of similar uses on properties which abut one another, consider the

> following development agreements and amendments to the zoning by-law, for lands which are located where any land use designations abut one another as shown on the Generalized Future Land-Use Map (Map 1):
>
> (i) amendments within a designation to provide for the development of uses which are uses permitted within the abutting designation;
>
> (ii) amendments within a designation to provide for the development of uses which are uses permitted by the zone on the abutting property within the abutting designation;
>
> (iii) development agreements within a designation which are extensions of development agreements in effect on the abutting property within the abutting designation."

Policy P-88 deals with the amendments to the Land-Use By-law.

> "P-88 It is not intended that all land shall be prezoned for specific uses. Rather, in order to give Council a greater degree of control, the Plan provides that certain land uses shall be processed as amendments to the Zoning By-law or in certain instances by development agreements. Such amendments and agreements shall be granted only if they meet the policies found with the Municipal Development Plan.
>
> The following uses shall only be considered by amendment to the Zoning By-law:
>
> (i) within the Residential Designation:"

It then goes on to list various types of zoning amendments permitted. The subject property is within the residential designation but the use to which it is to be changed does not fall within any of the categories established by this policy.

The second part of the policy dealing with development agreements is in the following text.

> "The following uses shall only be considered subject to the entering into of a development agreement and:
>
> (i). within the Residential Designation:
>
> (a) new mobile home parks or expansion of any existing mobile home park according to Policy P-31;
>
> (b) expansion of the Halifax Sufferance Warehouse according to Policy P-37;
>
> (c) expansion of existing commercial and industrial uses identified in Appendix "B" of the Zoning By-law according to Policy P-36; and
>
> (d) residential care facilities according to Policy P-27, and
>
> (e) senior citizen housing according to Policy P-40(a);

Policy P-89 then deals with the considerations Council should have in dealing with amendments to the Land-Use By-laws or development agreements.

> "P-89 In considering amendments to the Zoning By-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following:
>
> (i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations.
>
> (ii) that the proposal is not premature or inappropriate by reason of:
>
> (a) the financial capability of the Municipality to absorb any costs relating to the development;

(b) the adequacy of sewer and water services;

(c) the adequacy of road networks leading or adjacent to, or within the development; and

(d) the potential for damage to or for destruction of designated historic buildings and sites.

(iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

(a) type of use;

(b) height, bulk and lot coverage of any proposed building;

(c) traffic generation, access to and egress from the site, and parking;

(d) open storage and outdoor display;

(e) signs; and

(f) any other relevant matter of planning concern.

(iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

A public meeting must be held.

"P-90 In considering amendments to the Zoning By-law or development agreements, Council shall hold a public hearing according to the provisions of Section 36 of the Planning Act."

(N.B. the section reference to the Planning Act now seems to be obsolete.)

The Board cites Policy P-93 and P-94 as having a bearing on the appeal.

> "P-93 It shall be the intention of Council to permit development to take place on lots which have less than the minimum frontage or area required by the zoning by-law when such lots are created for the purpose of infilling and where municipal central services are available.
>
> P-94 It shall be the intention of Council to provide further controls over development within the Plan Area by fully enforcing the following By-laws:
>
> (a) the Building By-law;
>
> (b) the Unsightly Premises By-law;
>
> (c) The Topsoil By-law;
>
> (d) The Excavation By-law;
>
> (e) The Blasting and Dangerous Materials By-law;
>
> (f) The Mobile Home Park By-law;
>
> (g) The Sewer Connection By-law; and
>
> (h) The Occupancy By-law."

As a final comment on the Municipal Development Plan, the Board makes note that Policy P-88(1)(c) (Second part of policy) incorporates in the M.P.S. "existing uses... identified in Appendix "B"" of the Zoning By-law which is consequently set out in full as originally established:

> "APPENDIX 'B'; EXISTING USES
>
> Notwithstanding anything else in this By-law, the following uses are deemed to be permitted uses to the extent to which they are in existence on the effective date of this By-law, and any expansion, alteration or change of use may only be considered in accordance with the provisions of the Municipal Development Plan for Timberlea/Lakeside/Beechville and Sections 33(2)(b) and 34

of the Planning Act.

	CIVIC ADDRESS	LRIS INDEX NUMBER
Border Brokers Ltd.	1257 Bay Road	40049512
J.A. Walker Funeral Home	1562 Bay Road	40050866
	1565 Bay Road	40050890
Maritime Tel & Tel	1720 Bay Road	40026040
Boutilier's Wood Stoves & Crafts	1881 Bay Road	40026197
Johnson's Anteaks (sic)	1949 Bay Road	40026726
Ray's Appliance Service	2114 Bay Road	40026213
MacDonald's Bottle/Exchange Equipment Rental	2352 Bay Road	40027765 40027914
Kelly's Landscaping/ Construction	2404 Bay Road	40028003 40027997 40028011 40028029
Longard's Equipment Rental	2449 Bay Road	40027609
Awalt's Garage	2577 Bay Road	40050064
Ewing's Autobody	2581 Bay Road	40050155
Jackson's Electronics	2777 Bay Road	40054249
Timberlea Dive Shop	2810 Bay Road	40054157
T.A. Products	2892 Bay Road	40305369
Hanley's Garage	2912 Bay Road	40054512
CADA	3156 Bay Road	40304339
M. Longard's Trucking	2206 Bay Road	40026833
Harmoney (sic) School of Music	43 Fraser Road	40043747
L. Riley's Trucking	121 Fraser Road	40045213
C. Riley's Trucking	124 Fraser Road	40043697

Glengarry Garden Sales Office	58 Forestglen Drive	40029977
Young's Printing	15 Charles Street	40043531"

In this, the original printing of the By-law passed and approved contemporaneously with and pursuant to the Municipal Development Strategy, the present Applicant, Mr. Conrad, has no place.

The question is can Mr. Conrad's property be added to Appendix "B" of the Land-Use By-law without amendment to the M.P.S.?

In the Board's opinion Policy 36 and Policy P-88(i)(c) (the second or development agreement portion of the section) of the M.P.S. both incorporate by reference Appendix "B" of the Land-Use By-law into the Municipal Planning Strategy. The Board finds (given the narrow form of this type of Land-Use By-law, the long study that went into the Municipal Planning Strategy by Council and its preceeding committees,) that Council intended to incorporate by reference Appendix "B" listed properties into its Municipal Planning Strategy. Council made no attempt in 1985 to amend the M.P.S. Since, in the view of the Board, such a change was necessary to preceed (or at least accompany) the Land-Use By-law change here attempted, the amendment here was made contrary to the intent of Policy 36 of the M.P.S.. The amendment to the Land-use By-law also violates the intent of Policy 83 (See page supra) which requires amendment to the M.P.S.

when there is a request for a land-use by-law amendment which requires that a policy in the M.P.S. also be amended. On the contrary, it was the opinion of the deciding municipal legislators, and all their advisors, that such an amendment to Appendix "B" by an addition without amendment to the M.P.S. was possible. As stated on page 72, the preamble to the implementation section of the M.P.S. "Council cannot take any action which would in any manner, be inconsistent with the plan and be at variance from it". Council, in the view of the Board, did so by adding to Appendix "B" (the Board makes no decision on whether Council can add or detract from Appendix "D" which is the other half of the amendment appealed). In the present application before the Board, Council did not amend its M.P.S. and acted inconsistently with its M.P.S. as the Board finds the M.P.S. to exist at the time of this rezoning application. This finding in itself is, of course, sufficient to allow the appeal of the qualified Appellants since the amendment is clearly contrary to the M.P.S. and the intentions therein contained.

As a cause of increased trucking traffic in the area, the actual expansion of Mr. Conrad's business would militate against the thrust of P-13 which envisaged that this part of Highway No. 3 not be used for increased truck traffic.

As stated on page 30 in the preamble to the M.P.S. Section entitled "Land-Use Intent" the residential designation is intended to protect low density residential development as well as to encourage a housing mix and other compatible uses. Mr. Conrad's use clearly is not a compatible use with the surrounding residential uses. The thrust of the land-use by-law amendment expands the serious land-use conflict exemplified in the evidence and, as a result, fails to conform with the aforementioned statement from the M.P.S.. The land-use by-law amendment and the contemplated expansion of non-residential uses violates P-23 and also the latter part of P. 36.

Mr. Cragg, Counsel for the Municipality, very strongly defended Council's position by referring to the following statement of Planning found on the bottom of Page 39 of the Municipal Planning Strategy which reads as follows:

> "The intent of the Plan is to minimize and where possible, resolve some of the most serious land use conflicts and to designate areas which are appropriate for such development. There remains however, a number of existing commercial and industrial uses located in residential areas, which do not involve serious land use conflicts. These uses are reasonable in terms of the services they provide, their acceptance to the community and their suitability to the immediate area in terms of scale and site."

His points, if the Board may summarize them as it understood them, may be stated as follows:

1. On this 10,800 sq. ft. lot there is a serious land-use conflict in a residential zone caused by Mr. Conrad's present use of the subject property.

2. Administrative efforts to date by the Municipality to correct this serious conflict with surrounding residential uses have failed.

3. The residential neighbours are upset.

4. The only way to cure this serious land-use conflict is to grant the applicant his requested land-use privileges and to control the expansion which is taking place, in any event, by a development agreement with Mr. Conrad.

The Board disagrees with the submission of Mr. Cragg in two major respects:

1. The Board disagrees with the opinion of Mr. Cragg when he says that the amendment he supports is the only solution to the serious land-use conflict that exists, and

2. The Board further believes that, in any event, the proposal of Mr. Cragg would not, on the evidence before the Board, in any practical fashion, work.

Mr. Birch alluded to, in his evidence, the historical behaviour of the Applicant, Charles Conrad Jr., concerning the subject land. The documents provided by the Appellants (summarized as well in their viva voce evidence) and filed with this Board confirmed this view and showed clearly Mr. Conrad Jr.'s course of conduct. The M.P.S., (Policy P-94), spells out the duties of Council "to support the

M.D.P. by fully enforcing the By-laws." Other lines of approach to cure the land-use conflict found here can be found by following the various provisions of P-94(a); and P-94(b) since violation of both such provisions have been proven in evidence before the Board (and not contradicted in any way by Mr. Charles Conrad Jr.), it would seem that the County had other alternatives. If the Council chose not to follow up its duties under P-94 (which it has demonstrably not done in this case), then it is clear that it has acted by acquiescing in these violations. In such acquiescence, Council appeased the offender by trying to give him a prefered status under the land-use by-law: it has thus acted in contravention to its own M.P.S.

In the opinion of the Board, given a lot this size, given the proximity of the other residential uses; given the scoff law attitude and history of the Applicant; and given the very uncertain status of the exact nature of the occupation and the type of the use now existing and to be expanded; given the clearly contrary recommendation of its planners, no use of the lot as contemplated would cure or even ameliorate the problem of acute land-use conflicts. It is therefore quite clear that Council has acted contrary to the intent of its Municipal Planning Strategy.

Mr. Birch's evidence (much of it summarized at page 13 to page 16 of this decision) highlighted the extreme land use conflicts of the subject property with the surrounding lands generated by the use of the subject land in violation of the M.P.S..

Council in 1982, with the approval of the Minister, set up a Municipal Development Plan for Timberlea (inter alia) which committed Council to move from its previous position of relative freedom of rural unplanned development. Council, in 1985, tried, to retreat from that position for the property in question. Without a change in the M.P.S., Council no longer has that option.

Before closing this opinion, the Board wishes to allude to Section 63(1)(a) of the Planning Act and deal with the Appellants before it. All the Appellants were of a status that can only fall under Section 63(1)(a) "an aggrieved person". That phase has been exhaustively defined by the Board in Riverlake Residents Association NSMB-448-84-P. The phrase was also more recently dealt with in Douglas Benedict v. The Town of Truro NSMB-475-85-P.

Given the way the evidence was led in this matter by the Appellants, the Board must again deal with the phrase in this case. The Board finds that under Section 63(1)(a) of the Planning Act sufficient evidence has been adduced to qualify Robert Fournier and Anne Fournier as aggrieved persons within the meaning of the Statute and following the tests outlined in both Riverlake and Benedict. James Goodwin gave viva voce evidence and also showed a sufficient pecuniary interest in the subject matter of the appeal to be an aggrieved person, by himself and, by extension, his Wife, Carolyn Goodwin, also.

With some hesitation, the Board recalls its view of the site, the photographs tendered, the proximity of the Fudge lot to the subject property, the fact that Mr. Fudge and his Wife had signed the Notice of Appeal, and deduced from those facts that the Fudges' were also aggrieved persons since they had suffered pecuniarily and therefore are appropriate Appellants before the Board.

The Appellants Gerlitz and the Appellants Brown and the Appellants Boutilier gave no evidence before this Board: there was no other evidence adduced sufficient to enable the Board to determine whether or not they were aggrieved persons within the meaning of the Statute. The burden is on each Appellant to prove his status as an aggrieved person. In the evidence adduced, these people, of course, are not qualified Appellants since they have not been proven to be aggrieved persons.

In the opinion of the Board the qualified Appellants have discharged the onus on them of proving that the decision of Council does not reasonably carry out the intent of the M.P.S.. The Board therefore allows the appeal of the qualified Appellants by reversing the decision of the Council amending the Land-Use By-law.

In the result, the Appeal of the Appellants Fournier, Goodwin and Fudge will succeed and an order will issue accordingly. The appeals of the Appellants Brown, Gerlitz and Boutilier will fail since they have not been proven to be aggrieved persons. To the Applicant and to the County this distinction between successful and unsuccessful Appellants will, perhaps, be of no great concern. To the unsuccessful Appellants, in this case, there may be no practical harm.

DATED at HALIFAX, Nova Scotia, this 4th day of November A.D., 1985.

DARRYL W. WILSON, Member.

RICHARD L. WELDON, Member.

NOVA SCOTIA MUNICIPAL BOARD.

R. E. Arenburg v. Town of Amherst

PLANNING--CONTRACT ZONING--APPROVAL OF DEVELOPMENT AGREEMENT TO PERMIT A MOBILE HOME PARK--CONSISTENCY WITH M.P.S.--APPROVAL OF AGREEMENT PRIOR TO MINISTERIAL APPROVAL OF M.P.S.--MUNICIPAL AFFAIRS ACT, S. 24--MUNICIPAL BOARD ACT, SS. 27(2),(3), 32(1),(2) --PLANNING ACT, SS. 36(2), 38, 42(2), 43(1),(4), 66(1), 68(b), 71, 77(3)

This is an appeal by R.E.A. from a decision of the Council of the Town of Amherst made on July 15, 1985 authorizing a development agreement with F.H.& R.Ltd. The agreement would permit a mobile home park on a site which was not zoned to permit a mobile home park "as of right". The Appellant is the owner of a single-family dwelling in Amherst. The Town has a Municipal Planning Strategy (M.P.S.), which was passed by Council on May 13, 1985 and approved by the Minister on July 26, 1985.

HELD: The appeal is allowed.

The Appellant is an aggrieved person and thus an appropriate Appellant. Certain deficiencies in relation to the Notice of Hearing do not deprive the Board of jurisdiction in this case. The development agreement passed by Council on July 15, 1985 had no M.P.S. on which it could be based because the M.P.S. had not by that time received the necessary Ministerial approval. It follows that the decision of Council cannot be said to be consistent with the intent of the M.P.S. since there was no M.P.S. in effect. The Board must interfere with the decision of Council since that decision cannot reasonably be said to be consistent with the intent of the M.P.S. Under s.71(4) of the Planning Act, the Board has no choice but to refer the matter back to Council for further consideration. While the Board heard submissions as to the merits of the decision to permit a mobile home park in light of the M.P.S. now in force, it declines to comment on the merits of the decision in order to ensure that interested parties can participate in public hearings and other planning processes should the proposal come forward a second time.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by R.E. ARENBURG 51 Cornwall Street in the Town of Amherst, against the decision of the Council of the Town of Amherst made on July 15, 1985, approving a development agreement with Fundy Housing and Recreation Limited.

BEFORE: RICHARD L. WELDON

COUNSEL: RUTH E. ARENBURG, the Appellant on her own behalf;

DAVID A. MILNER, LL.B., for the Town of Amherst;

KEITH BLENKHORN, on behalf of the Applicant, Fundy Housing and Recreation Limited

DECISION

This is an appeal made under Section 71 of the Planning Act by the owner of a single-family dwelling in the Town of Amherst, from a decision of the Town Council of Amherst made on July 15, 1985 authorizing the execution of a Development Agreement with Fundy Housing and Recreation Limited respecting the proposed development of a mobile home park in an area of the Town near Cornwall Street and Victoria Street West, adjacent to the Town-County boundary. The Notice of Appeal is dated July 31, 1985. It was received by the Board on August 2, 1985. The Notice of Appeal was not accompanied by an undertaking to pay the cost of advertising the Notice of Hearing as required by Rule 5(1) of the Board's Rules of Practice and Procedure made under the Planning Act. The Board extended the time for filing such under Rule 5(2) for a period of 14 days from August 7, 1985 (which extension was an incorrect extension) since it could only have been extended, according to that Rule, to August 16, 1985. A written undertaking to pay for the advertising dated August 20, 1985 was received by the Board on August 28, 1985. Under Rule 5(3), the late filing of such an undertaking is, however, not fatal to the further consideration of the appeal.

The appeal was set down for 1:00 P.M., September 18, 1985, at Town Council Chambers, Town of Amherst, Confederation Memorial Building, Ratchford Street, Amherst, N.S. The Appellant was notified, in writing, by the Clerk of the Board to serve a Notice of Hearing on the following persons:

" Ronald Simpson, Esq.,
Provincial Director of Planning
Department of Municipal Affairs
P.O. Box 216
Halifax, Nova Scotia
B3J 2M4

Honourable T. McInnis
Minister
Department of Municipal Affairs
P.O. Box 216
Maritime Centre, Barrington Street
Halifax, N.S.
B3J 2M4

Fred Haines, Esq.,
Chief Administrative Officer
P.O. Box 516
Amherst, Nova Scotia
B4H 4A1

David A. Milner, Esq.,
Milner, Shatford
P.O. Box 398
Amherst, N.S.
B4H 3Z5

Keith Blenkhorn, Esq.,
Fundy Housing & Recreation Ltd.
P.O. Box 474
Amherst, N.S.

All the assessed owners of land
within a distance of 500 feet of
the subject site."

As well, and at the request of the Board, the Clerk of the Board called the Appellant by phone and suggested that the Appellant cause the appropriate search to be made to determine the names and addresses of the assessed owners of land within 500' of the subject property and, in that conversation, noted the type of evidence required to prove services of Notices on the persons thus found.

At the hearing, Mr. Milner, on behalf of the Town of Amherst, made no objection to the Notice of Appeal or the service of the Notice of Hearing. Mr. Blenkhorn, on behalf of the Applicant, agreed that he had received both the Notice of Hearing and the Notice of Appeal. The tear sheets of the newspaper publishing the Notice of Hearing were adduced (see Exhibit C-2) dated Thursday, August 29, 1985; Thursday, September 6, 1985 [sic] and Thursday, September 12, 1985. The Appellant testified that she had sent by mail, Notices of the Hearing to all of the persons listed in the Board's instructions to her. She said she had obtained from Mr. Haines of the Town of Amherst, a list of all the assessed owners within 500' of the site of the Proposed mobile home park. She personally delivered the Notices of Hearing to all the petitioners who signed the Petition (see Exhibit C-3), as well as to all other persons listed for her by Mr. Haines. She also delivered the Notices of Hearing to nearby property owners in the County of Cumberland. She did not produce the list given to her by Mr. Haines.

She did not produce a list of names and addresses of the persons she served with the Notices of Hearing or how, when, or where she served the Notices of Hearing and she did not provide names and addresses of those who were assessed owners within 500' of the area.

The failure to deliver to the Board a timely Notice of Appeal deprives the Board of jurisdiction in Planning matters. The failure to prove service of the Notice of Hearing may be a valid ground for an adjournment. If an oversight on the Notice of Hearing were deliberate on the part of the Appellant, the Board might be tempted to dismiss the appeal rather than to adjourn the hearing since an adjournment ordinarily benefits an insincere Appellant wishing to delay development by using the appeal system for its maximum delay. Development delayed may mean development destroyed. Economic hardships caused by insincere Appellants may destroy what may be good planning initiatives by Council. On the other hand, the Planning Appeal processes under the various statutes and rules (although designed to notify all possible persons with interest), are somewhat cumbersome to follow. For a person not versed in the Planning Appeal process in particular, and in the legal process in general, the varied requirements for service, as they are set out, must be that much more difficult to follow. Mrs. Arenburg, the Appellant, followed the Clerk's instructions as best she could. The Board believed her evidence when she said that she had not engaged in any planning appeal process before this one. The Board notes that both the Town of Amherst and the Applicant, the two parties most directly affected by this appeal, accept the regularity of the services of the Notice of Appeal and Notice of Hearing. As to the publication of the Notice of Hearing, the Board finds as a fact, that the Amherst Daily News published bearing date "Thursday, September 6th" was in fact published on Thursday, September 5th, 1985. The Board infers from all the evidence before it, that "all persons within 500' of the property subject to the development agreement" were notified of the hearing at the appropriate time.

Because of the assent of the major affected parties, the Board accepts the Appellant's evidence as proving timely notification of the commencement of the proceedings to all parties pursuant to Section 27(2) of the Municipal Board Act and, with some degree of hesitation, it accepts the evidence of service of the Notice of Hearing as required by the Statutes, the Rules and the Board's directions, and finds therefore that the Board has jurisdiction to hear the appeal on its merits and also to hear the appeal at the time and place scheduled without any adjournment to allow the Appellant to perfect proof of service of the Notices of Hearing. The Notice of Appeal in its text expresses the Appellant's grounds for appeal and is here quoted verbatim:

> " The park would decrease the value of our homes. There would be a lack of school facilities and play area for the children and the fact that there now exists two trailer parks in this area."

The Appellant, Mrs. Arenburg, testified herself and called Mr. Cecil Smith and Mr. George Forbes as witnesses.

Mr. Milner, for the Town of Amherst, called Mr. Jens Jensen (twice), Mr. Richard McCready, Mr. Ronald S. Patterson and

Mr. Fred Haines. Keith Blenkhorn for the Applicant testified himself and also called Mr. Pearle Hudson. When the Board asked the audience to participate in the Appeal, one Mrs. Alice Hudson, coming forth from the audience, testified on her own. The Board heard her as an interested party under Section 27(3) of the Municipal Board Act.

The evidence may be briefly summarized as follows.

Mrs. Arenburg introduced a signed Petition (see Exhibit C-3). She said basically, that the signers of the Petition wanted no more trailer courts in their area. She said she lived on "the wrong side of the tracks in the town" and that most mobile homes in Amherst were put in this area. The value of adjacent lands went down when trailer courts were built in the Town.

Mrs. Arenburg resides at Cornwall Street, which is adjacent to the large field of which the property, subject to the appeal, forms a part. The subject property is a rectangular piece of property running parallel to James Street (one lot deep northeasterly therefrom) to the southern boundary of Victoria Street West. The southeastern boundary of the subject property is parallel to Cornwall Street and approximately one lot to the northwest of the northern boundary of Cornwall Street. The long dimensions of the rectangle are parallel to James Street. The short side of the rectangle comprising the subject property are roughly parallel to Cornwall Street. Mrs. Arenburg's property is at the northwestern intersection of Cornwall Street and Aspen Drive. All these areas have been marked graphically on Exhibit C-7 by witnesses.

During Mrs. Arenburg's stint on the witness stand, the Board acknowledged that an unaccompanied view had been taken by the Board of the site and some of the surrounding trailer parks prior to the hearing. She also said that she checked with the West Highland School principal who told her that in his school, the three available classrooms were already occupied by 35, 27 and 37 children respectively. She wondered where the extra children, who would likely be brought into the area following the building of the proposed trailer park, were going to be able to play. She felt that the building of a trailer court in this area would not reduce the annual grass fires in the field behind her house. She has never had a formal appraisal done on her house. She believed there would be about four conventional homes built under the Development Agreement and approximately 48 trailer units. The trailers, she believed, would be self-owned and that the lots on which to place them would be rented.

The Appellant then called Cecil Smith of West Victoria Street. He stated that he agreed with what Mrs. Arenburg had said. He said that he was going to be next door to the trailer park when it is built. He feels that his property will be depreciated by the presence of the proposed trailer court. He does not feel the area could stand another trailer court. He sold some of the land for the trailer court after being told it was going to be developed into a subdivision for conventional homes. He attended the public meeting before Town Council. He said that the Town Council voted 6 to 1 for the trailer park and he felt the Town Council was elected on a ward basis [which last fact was discounted by subsequent witnesses].

Mr. George Foster, the owner of a property at 30 James Street, which is immediately adjacent to the subject property in the County, gave evidence. He had counted 72 trailers on Cornwall Street and 37 on Liberty Lane, both streets in Amherst, as of the afternoon of the hearing. He said all the Councillors live on the "upper side of the tracks" and they are not interested in having trailer parks in that part of the Town. On cross-examination, he admitted that there were some trailer parks on the other side of the tracks. He felt, however, the proposed trailers would bring down his property value. He is aware of the experience in Ontario where some towns had actually banned trailers and trailer parks.

Mr. Jens Jensen was called by the Town as its first witness. He is the Executive Director of the Cumberland District Planning Commission. He said that Commission is the agency which offers planning advice to the Town of Amherst, one of four participating municipalities so serviced by the Commission in the area. He lives at 192 Victoria Street, Amherst. Since 1972, with a one year exception, he has worked in Amherst. He has a Bachelor of Engineering Degree in Civil Engineering from the Royal Military College. He has a Master of Science Degree in Regional Planning. He has three years experience in engineering construction. He has a total of twelve years experience in Municipal planning and he is familiar with the history of planning in the Town of Amherst. He was involved with the planning process leading up to the adoption of the Municipal Planning Strategy by the Town of Amherst in 1985 and the adoption of its Land-use By-law. He identified for the Board the various Town Exhibits including a map of Amherst (Exhibit C-7) and he located on that map the major mobile home sites in Amherst and said there were four - Brentwood Estates, Highland Village, Anson Fundy Village, and Cornwall and Victoria Street West, the last one being the subject of this appeal.

He stated that the Municipality of the County of Cumberland, which is the adjacent municipality to the Town of Amherst on the relevant border, does not have a Municipal Planning Strategy.

He said he attended the Town Council hearing of July 15th and he helped in the preparation of the Planning Advisory Committee Report presented there. He also gave verbal advice to the Town Council. He said the entire Council was in attendance and Mayor Emery was in the Chair. He said the meeting proceeded in an orderly way. The Council Chamber was about half-full of people and the public meeting portion was appropriately put on the Council agenda. He felt there were about 30 people in the audience. He saw Mrs. Arenburg, the present Appellant, at the Council Meeting. Mr. Jensen said, along with Mrs. Arenburg, that Mr. Cecil Smith expressed his views at that Council Meeting. The resolution on the agreement was passed, with a majority of 6 to 1, with the Mayor voting.

He said Richard McCready, a co-worker, had worked for years on perfecting the Municipal Planning Strategy for Amherst. He said McCready also reviewed the planning transactions leading to the Development Agreement here being appealed. He dealt directly with Mr. Blenkhorn, an agent of the Applicant in the Appeal. Mr. Jensen is satisfied in general, that the "rezoning" engendered by the subject Development Agreement agrees with the Municipal Planning Strategy and specifically with the Mobile Home Parks By-law. He produced an office consolidation of the Amherst Mobile Home Parks By-law as annoted by himself, and this was introduced into evidence. Cross-examination of this witness was extremely light merely dealing with his preference in private residential housing and whether he would like personally to live near mobile home parks. He said he would not, and stated his reasons.

Mr. Jensen said the sewer and water services were adequate to accommodate the proposed development, that Amherst had basically a combined sewer system but was now separating storm sewers and sanitary sewers. The Town's water supply is drawn from a series of deep wells circulated through a central water system. He read from Exhibit C-9 concerning the passage of the subject Development Agreement. He referred in this part of his testimony to the Municipal Planning Strategy of Amherst and specifically to Policies 1.4; 1.4.1; 1.4.2; 1.4.3; and 7.21. He also said there was a demand for affordable housing within the Town. He said that, although the population of Amherst was decreasing, the number of separate households within the Town was increasing.

Mr. Richard McCready of 47 Victoria Street testified that he was a planner for the District Planning Commission. He gave evidence that he was a B.A. graduate from Laurentian University in Sudbury, Ont., in 1978 and that he had a

Master's Degree in Urban Renewal Planning from the Technical University of Nova Scotia, graduating in 1982. He has worked in Amherst since 1982 and he had worked on the Amherst Plan and the Plan of the Town of Springhill. He said that there was a considerable amount of research done by the District Planning Commission in preparing the Municipal Planning Strategy for Amherst. He said there was considerable citizen participation in the preparation of the Municipal Planning Strategy for Amherst. He said that the Development Agreement relating to the subject property contained in Exhibit C-9 followed Policy 1.41 of Amherst's MPS. He said permitted uses under the new mobile home park by-law fell within the residential use provided for under the Future Land-use Map in the Town's Municipal Planning Strategy and therefore the subject development agreement was appropriate. He said about two-thirds of the Future Land Use Designation of the Town of Amherst is residential and any area marked residential on the "Amherst Municipal Development Plan" for future use can become eligible to be used for a mobile home park. Amherst's Mobile Home Park By-law requires appropriate buffering to separate the mobile home use from the surrounding uses. He also referred to Policy 7.31 "Development Agreements".

He mentioned there was a report from the Planning Advisory Committee concerning West Highland School. In making that report, he determined the ratio of children per household. He assumed the proposed development would produce 52 more homes and he based his subsequent calculation on that assumption when in fact, the development would produce only 44 trailer spaces and 4 conventional homes and therefore only 48 more households in all. By calculation, he concluded a maximum of 40 students would be added to the school population by the building of the proposed development. He used a ratio of .74 elementary school children per dwelling unit. He said that the figures used in Amherst in 1981 were .29 elementary school children per dwelling. With the assumption, his calculation had "another" safety margin built in. In any event, he said that he really did not think the level of elementary school population was too relevant because if the same land had been developed "as of right" in accordance with the residential density allowed by present zoning, the single family houses or duplexes already allowed by the present zoning would produce, when built and occupied, about the same number of households as would be produced by the proposed development and therefore the proposed development would bring no more children than those already contemplated into the school system. He said he disregarded the fact that there had already been in this year, in the same general area of Amherst, 30 to 35 trailer units approved in a Mobile Home Development Agreement. As a reasonable basis for this disregard, he repeated his arguments concerning number of prospective school children that he had made in his evidence concerning the subject development agreement. His last check on school population was on September 30, 1984 for the June 1985 Council meeting. He also noted that it was usual in Amherst, and in certain schools in the adjacent municipality when there was overcrowding in the schools, to use portable classrooms.

He said the Development Agreement provides for a green area to be set aside and the developer is required to bring the green area up to useable standards and then to maintain it as a play area for children. He said the buffering would be done along the two boundaries of the trailer park by:

(a) having one tree planted per mobile home lot

(b) preserving the existing trees within four meters of the boundaries of the park

(c) preserving any tree on the site over 4 meters in height

(d) planting a line of trees along the two long boundaries of the site

He was not sure if the check list required by the Municipal Planning Strategy had been brought to Council's attention. He had not attended the decisive session of Council at which the development agreement under appeal had been approved. He felt that the Planning Advisory Committee "had in mind" the check list under Policy 7.39 of the Municipal Planning Strategy. He then explained that the District Planning Commission (DPC), jointly funded by the Provincial Government and the four municipalities, does the planning for all four municipalities. The Town of Amherst has no planners per se. Amherst's only paid employee directly dealing with planning is the Development Officer.

He also says that there are four Councillors plus the mayor on the Planning Advisory Committee and, of course, that means five out of the seven Town Council members are also members of the Planning Advisory Council.

The next witness was Ronald S. Patterson. He has been the Town Engineer since 1981 and is the Executive Director of the Amherst Area Industrial Commission. He lives at 24 Allison Ave., Amherst, N.S. He is a professional engineer with a diploma in Civil Engineering from the University of New Brunswick in 1970. He worked several years with Robb Engineering, three years with Dominion Bridge and did some design work on sanitary and commercial sewers. He ran a business in construction, installing Butler Buildings. He said he constructed some municipal works. As Amherst's Town Engineer, he runs the Amherst Public Works Department, the Amherst Water Utility and he works with developers on Development Agreements in Amherst, insofar as those agreements concern problems which arise relating to streets, water, and sewer. In the proposed development in question, he discussed with the developer, the developer's general proposals and reviewed the developer's engineering requirements. He would be inspecting the on-site services after they were installed by the developer. He said it would require a "cut" in on-site grades in order to install the sewers. He said the Town water supply was adequate to supply the proposed mobile home park. Amherst has six artesian wells in production.

The Town recalled Mr. Jens Jensen. He gave some history of the first Amherst Municipal Development Plan, which was put in force in 1974 and which required a five year review. That review started about 1979 and was still on-going in 1984. He said the Council that finally brought in the Municipal Planning Strategy for Amherst and the Land-use By-laws for Amherst is the same Council that is now sitting and Council therefore is very knowledgeable of Amherst's planning laws and planning strategy.

In response to questions by the Board, he went through the check list included in Policy 7.31. He said the PAC Policy reports in lieu of Minutes, did not outline the check list. The Development Agreement had a site plan attached and so it conformed with the check list requirement for a site plan. The text of the Development Agreement required sewer and water and thus that check list requirement was met. Whether or not it was premature as to expense, he noted everybody concerned knew the costs were assumed by the developer and therefore the item concerning expense on the check list was of no significance. These foregoing items were verbally reported to the Council on July 15. Adequate sewer, water and pollution control were discussed before the Council.

Adequacy of storm drainage was discussed with Council on the night of the public hearing. The adequacy of schools was dealt with in Mr. McCready's report. The adequacy of the road network was dealt with verbally before Council. The public water supply item on the check list was dealt with and judged to be no problem. Conflicts with nearby land use was dealt with in the same discussions. Buffering was dealt with during these discussions. Amherst's Mobile Home By-law was dealt with during these discussions.

Mr. Fred Haines, 51 Summit Avenue, Town Clerk of Amherst gave evidence. He has been the Town Clerk since January 1, 1985 and Acting Town Clerk approximately a year previous to that. He was Director of Finance for Amherst from 1981 to 1984 and he had been Town Clerk in Parrsboro from 1979 to 1980. He was not present at the July 15th Town Council Meeting, the public hearing at which the Development Agreement under appeal was approved. He was present at all PAC meetings concerning the subject development in his capacity as Secretary for the PAC.

He took the Minutes for the Committee of the Whole Meeting of Amherst Town Council prior to the June Council Meeting when the date of the public hearing was set. The Committee of the Whole reviewed the Development Agreement (included in Exhibit C-12). He introduced Exhibit C-12 as "excerpts of Minutes of the Meeting". He said the 40-odd dwelling units envisaged by the agreement would bring $500,000.00 worth of new assessment to Amherst. According to this witness, the PAC consists of four members of Council and three citizens at large. He discussed the meaning, in Amherst, of the phrase "wrong side of the tracks". He referred to one area [the wrong side] as being the older area. He preferred to call the area in question the "West Highland" area.

He felt that the cost of education per child per year would be in excess of $3,000.00 or $4,000.00 and there would be about 1.5 children per family on the average so that the education costs alone would more than eat up any new tax revenue from the new $500,000.00 assessment which could be derived from the appealed development. Therefore he felt that the development could not be justified on economic grounds from a straight taxation point of view (nor could any other residential development). He then analyzed the apartment situation throughout the Town and said there was a demand for apartments, that mobile parks were full and there was demand for more mobile homes inside Amherst. He said now a person would have to move outside of the town boundaries to be able to move into a mobile home park.

Keith Blenkhorn, President of Fundy Housing and Recreation Limited [the corporate Applicant], RR #2 Nappan, said he had fifteen years experience in the mobile home field, 1½ years in his new company and prior to that as an employee in this field for 13½ years, all in Amherst and in the Amherst area. There are four mobile home parks in Amherst and he had participated and been actively associated in three of these from the planning stage to and including the operational stage. He had looked around Amherst for a suitable piece of land that was available; he took out options on that suitable land. He consulted with the Town officials and then the Applicant made the application that now is before this Board on appeal. He felt that the composition of "his" park would be superior to Liberty Lane, the oldest mobile home park in Amherst. He felt with the buffering and the rolling hills "his" development would make an attractive park. He referred to "his" tenants as "owners of mini-homes". He felt that trailer lots would remain clean. He felt mini-homes were good affordable housing costing about one-quarter less than conventional housing. He felt that here were 155 mobile homes on the "good" side of the tracks and 109 on the "poor" side of the tracks. He felt the troubles plaguing mobile homes and mobile home parks in the early 1970s have now disappeared. He brought in a letter marked Exhibit "C-13" which the Board rejected on the grounds that its signatory could have been personally present for sworn evidence. Mr. Blenkhorn anticipated there would be a maximum 8' to 10' cut on the subject site for sewer and roads and he would grade that down from "his" lot boundaries at the site of the maximum cut on a two to one grade so that there would be a 20' slope from the lot boundary down to the bottom of the cut. He mentioned that West Highland School had two vacant classrooms. He said that, in any event, in the last four mobile homes his company had sold, there were no children involved and that the people purchasing mobile homes were frequently past child-bearing age. He said that there were playground provisions in his development and he would bring the playgrounds up to proper playground conditions. He felt he was investing $250,000.00 to $300,000.00 in this park in the Amherst area. He was employing four people now including himself and that employment would increase with the development of his mobile home park. He lived in a mobile home himself and spent 70% of his time in mobile homes and found them quite satisfactory.

The Applicant then called Pearle James Hudson of 10 James Street in the adjacent Municipality. He said that he had been retired for ten years and he welcomed the park with open arms because it will cut down the fire risk in the vacant field behind his house. There has been a fire in that field every year since 1956. He said that he had previously surveyed the property for one Harry Gordon to create Tantamar Residential Subdivision but the subdivision plan is missing from the Town Offices and the Registry of Deeds. He felt that his own house would not be reduced in value by the mobile home park installation. He felt that the yards in the mobile home parks that he saw around him in Amherst were well kept and were fixed up "nice and good".

Alice Hudson, also of 10 James Street, not called as a witness by any party, said she and her husband had owned two lots adjacent to the proposed mobile home park for over 44 years. Her husband had subdivided the land in question for one Harry Gordon of Halifax into 50' x 100' conventional residential subdivision lots. That subdivision would have accommodated 64 houses and the Town, at the time of that subdivision, would have put in water and sewer at the Town's expense. There would have been more people from that subdivison than from this prospective park.

She said there are only six houses adjacent to this property on James Street, one house in West Victoria Street, and one house on Cornwall Street, and 10 houses on the opposite side of James Street. She said the mobile home parks in Amherst were well-managed. Her daughter lived in one, and she was familiar with them through her daughter and she thought affordable housing in the form of mobile homes in mobile home parks ought to be permitted.

The Appellant's argument was brief. Her position, as described by her Notice of Appeal and evidence, may be summarized as follows:

> "(1) the large number of signatories on the petition exhibited herein, do not want another trailer park in their area.
>
> (2) More trailer parks in the area would devalue the residential single family homes within the area and would specifically devalue the home of the Appellant.
>
> (3) The Town culturally discriminates against the Appellant and all people in her area, on social grounds in that the Appellant (and her contemporaries) are on the wrong side of the tracks" and that the Mayor and Council (with one exception) were from "the other side of the tracks" and that this social distinction is exemplified by the Planning which puts all of the mobile home parks on "the wrong side of the tracks".
>
> (4) That the planning of the additional 44 trailer lots will overload the West Highland School.
>
> (5) That the same developments will increase the child population in the area and the extra children will have insufficient place to play."

The Applicant's position seems likewise straightforward:

> "(1) It believes there is a demand for affordable mini-homes in Amherst and that it is qualified and available to fill that demand.
>
> (2) It feels its development scheme will have a positive significant economic effect on the Town both during its construction stage and later in its operative stage.
>
> (3) That the development proposal, had been properly put to all the Town authorities, and had been thoroughly scrutinized by them. The appeal should be dismissed since all the appropriate planning requirements had been met."

Mr. Miller, on behalf of the Town, cited Section 71(5) of the Planning Act.. He cited Michael Behiels v the Town of Wolfville, NSMB-481-85-P. On the strength of those citations, he said that the Board had a very limited jurisdiction to interfere with decisions of Council and, in any event, the process of the development agreement here was in accordance with the Municipal Planning Strategy of Amherst, the Planning Act, and all the relevant by-laws of the town and therefore the appeal should be dismissed.

The evidence shows, and the Board at the outset finds, that the Appellant and other like-minded citizens had a full and ample hearing by the Town Council prior to the passage of the resolution proposing acceptance of the Development Agreement by the Town. The Appellant therefore had free access to the process of political approval of planning policy contemplated by the Planning Act, and she has not succeeded in her aims.

Behiels says (Supra, P.33 and following); "Council.... is obliged to consider whether the proposal concurs with the intent of the Municipal Planning Strategy ..... Council is to be guided by the Municipal Planning Strategy in evaluating the proposed development. The Municipal Planning Strategy also requires Council to seek the advice of its Planning Officer and it is common practice for planning staff to evaluate a proposal and make a recommendation to Council. Whether the Council accepts the advice of staff is up to Council.....". At Page 34: "Council in deciding to approve this particular development, has evaluated the relative weight to be given to the many criteria set out in the Municipal Planning Strategy." At Page 35 Behiels says: "The Board's function is to hear the appeal, review the Municipal Planning Strategy and the proposed agreement and determine whether the agreement is consistent with the intent of the Municipal Planning Strategy. Section 71(5) of the Planning Act obliges the Board not to interfere with the decision of Council unless the decision cannot be said to be consistent with teh intent of the Municipal Planning Strategy." The present Board finds no problems with the findings of Behiels but wonders whether Behiels applies to the facts in this particular case.

As a preliminary, the Board finds on the evidence that the Appellant is an aggrieved person within the meaning of Section 71(1) of the Planning Act and is thus an appropriate Appellant. See Riverlake Residents Association, NSMB-448-85-P.

The Town of Amherst has passed a Municipal Planning

Strategy pursuant to Section 38 of the Planning Act. Section 55 of the Planning Act contains provisions concerning the negotiation of a development agreement. Under Section 66(1) of the Planning Act, Council shall approve the entering into of a Development Agreement by resolution. In the case of an appeal from the Council's decision to adopt a Development Agreement, Section 68(b) of the Planning Act prevents the Development Agreement from being entered into until any appeals are disposed of and Council's decision has been confirmed by the Board's decision on the appeal.

The Board has a duty to read the whole of the Municipal Planning Strategy in arriving at its decision. See Wallace MacDonald, Lively and Tolson, NSMB-468-84-P.

Wallace MacDonald (supra) also deals with approvals, and the burdens on Appellants under Section 77(3) and 71(5) of the Planning Act.

The Board, however, notes that the Municipal Planning Strategy of Amherst, which is filed as Exhibit C-6, was approved by the Minister of Municipal Affairs July 26, 1985. The decision of Council approving the subject development agreement, after much prior preliminary work, was made on July 15, 1985.

Under the provisions of Section 36(2) of the Planning Act "A municipal planning strategy or an inter-municipal planning strategy takes effect upon, and not before, approval by the Minister". Thus on July 15, 1985, Amherst's Municipal Planning Strategy as adduced before this Board had not yet taken effect. Ministerial approval is required for the adoption of the MPS (see Section 43(1) of the Planning Act). Section 43(1) of the Planning Act requires adoption of the MPS by a majority vote of the whole Council. This occurred according to the evidence at the Town Council meeting held in Amherst, May 13, 1985. Pursuant to Section 42(2) of the Planning Act, the Minister shall approve a MPS submitted to him, with certain exceptions. Under Section 43(4) of the Planning Act, certain materials must be forwarded to the Minister with a request for approval. The MPS passed by Amherst Town Council on May 13, 1985 was certified by the Town Clerk, May 16, 1985, presumably for presentation to the Minister of Municipal Affairs. Nowhere in the evidence does it show when the material was submitted to the Minister. Under Section 43(4) of the Planning Act, the Minister shall approve the strategy (or notify his non-approval) within 60 days of the receipt by him of all required documentation. He did not so certify within 60 days of May 16, 1985, but he did so certify his approval under Section 24 of the Municipal Affairs Act on July 26, 1985. The Board presumes that the Minister approved the Municipal Planning Strategy within 60 days of the receipt by him of the documentation required under Section 43(4) of the Planning Act. The delivery time of the materials was not shown (see Section 43(4) of the Planning Act). In absence of evidence to the contrary, the presumption of legality of actions of government officials allows this Board to presume the delivery of the materials required was made at a time within 60 days of the Ministerial approval on July 26, 1985.

Until Ministerial approval was issued on July 26, 1985, Amherst did not have in effect the Municipal Planning Strategy filed as Exhibit C-6 and that is the only Municipal Planning Strategy which is in evidence in any detail before the Board.

The Board, on the evidence before it, concludes that the Development Agreement passed by Council July 15, 1985 had no MPS on which to base itself, that the "Development Agreement" would be contrary to then existing R-2 zoning of the subject site and the so-called "Development Agreement" at the very least, would not effect a change from R-1 zoning to Mobile Home Zoning. The "Development Agreement" purported to be made pursuant to and a part of a Municipal Planning Strategy not in effect at the time because the Municipal Planning Strategy had not as yet received necessary Ministerial approval. Since there was no modern Municipal Planning Strategy in effect at the time of Council's decision on the night of July 15, 1985, it follows that the decision of Council to approve a Development Agreement cannot be said to be consistent with the intent of the Municipal Planning Strategy since there was no Municipal Planning Strategy in effect with which the decision and/or the agreement could be consistent.

The Board, of course, as an inferior tribunal, has no power to police any Council with prerogative remedies. It does, however, have power to review, under its sole jurisdiction (see Section 32(1) of the Municipal Board Act), the relationship between Development Agreements and Municipal Planning Strategies as provided for in the Planning Act. Under Section 32(2) of the Municipal Board Act, in all matters under its jurisdiction, the Board does hear and determine all matters of law or of fact.

Having come to these conclusions, that the proposed Development Agreement is inconsistent with, and cannot be said to be reasonably consistent with, the Municipal Planning Strategy of the Town of Amherst, the Board must interfere with the decision of Council since that decision cannot be reasonably be said to be consistent with the intent of the Municipal Planning Strategy.

The Board then must review its powers on this appeal. Under Section 71, the Board has only limited powers when it decides an appeal under this Section. It cannot set aside the decision of Council. The Board's powers in this appeal are set out in Section 71(4) of the Planning Act:

> "71(4) The Board shall
>
> (a) confirm the decision of the Council
>
> (b) make any decision the Council could have made; or
>
> (c) refer the matter back to the Council for further consideration."

Section 71(4)(a) does not apply in this appeal. Section 71(4)(b) does not apply since the Council could make no decision and therefore the Board can make no other decision for it. Under Section 71(4)(c), the Board can only send the matter back to the Council. In fact, and in law, the Municipal Planning Strategy in evidence before the Board was not in effect at any time relevant to the appeal and therefore the "Development Agreement" purporting to be made has not been made or, in the alternative, that if a "Development Agreement" had been made there was no Municipal Planning Strategy with which to compare it in order to judge the consistency of the agreement with the intent of the Municipal Planning Strategy.

This finding in no way precludes the Town or the Applicant (at least in any time subsequent to July 26, 1985) from preparing for, from negotiating and from approving a Development Agreement on the land as envisaged here. The Board merely says that, as of the time Council's decision (here appealed) was made, no Development Agreement could have been approved since there was no Municipal Planning Strategy authorizing Council to approve a Development Agreement.

Because of the lack of pre-hearing documents and pre-hearing conferences, the Board was unable to review this simple problem by itself prior to the hearing and thus subject the whole proceedings to this elementary test. The Board proceeded at the hearing as if Town Council of Amherst had (what it had purported to have) a Municipal Planning Strategy and a Development Agreement lawfully in effect on July 15, 1985. The Board heard all parties to this appeal on its other merits, as well, on the assumption that a prima facie valid Municipal Planning Strategy was in force at the relevant time and a prima facie valid Development Agreement had been made pursuant thereto. Since that was not the case, the Board deems it inappropriate to comment on the other planning issues. It felt the better course would be to remain silent so as not to interfere in any subsequent planning process that could occur should the Applicant or someone else make another application to Smherst for a development agreement respecting the subject lands. The Planning Act's intention is to maximize public participation in the negotiation of Development Agreements. In order to ensure all interested parties participate in public hearings and other planning processes should there be a second time around, the Board will remain silent in its present views on the other merits of this appeal and will say only that there was no Municipal Planning Strategy in effect in Amherst, of the type proven before the Board as of July 15, 1985 and therefore there was no basis for the subject Development Agreement between the Town of Amherst and the Applicant. There was, in any event, no Municipal Planning Strategy with which this Development Agreement could be compared for consistency in intent, reasonable or otherwise.

There is no evidence before the Board as to whether or not the proposed Development Agreement was registered with the Registry of Deeds in Amherst (see Section 70(1) of the Planning Act) but if it was, then that agreement ought to be removed therefrom. On the perusal of the Planning Act and of the Municipal Board Act, the Board itself can find no basis on which it has power to grant such an order and consequently will not order any such discharge. If the Board could order a discharge to that agreement on the Registry of Deeds, it would.

In the result, the Board will issue an Order referring the matter back to Council for further consideration.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of December, 1985.

RICHARD L. WELDON
Member

Re Town of Truro

MUNICIPAL REPRESENTATION-----AMENDMENT OF WARD BOUNDARIES--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, SS. 13, 14

This is an application by the Town of Truro to amend ward boundaries. The Town Clerk gave evidence on behalf of the Town. No one else gave evidence or made submissions.

HELD: The Board will grant the Order requested.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, being Chapter 195 of the Revised Statutes of Nova Scotia, 1967;

- and

IN THE MATTER OF: The Application by the Town of Truro respecting ward boundaries within the Town of Truro.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman,

RICHARD L. WELDON, Member.

COUNSEL: DAVID W. GRUCHY, Q.C.,
For the Town of Truro, Applicant.

DECISION

By application dated March 29, 1985, the Town of Truro applied to this Board to amend its ward boundaries effective June 1, 1985.

By an Order granted April 19, 1985, the Board acknowledged the "Petition" of the Town of Truro dated March 29, 1985, set down the hearing for May 22, 1985, ordered that Notice of the application be given by insertion in the Daily News, a newspaper circulating in the Town of Truro, on May 1st, May 8th and May 15th, 1985, and that Notice of application be given by the Applicant at least two weeks prior to the date of the hearing to John Mullally, Esq., Deputy Minister of Municipal Affairs.

The Board heard this application at the Council Chambers, Truro, May 22, 1985, commencing at 10:00 a.m.

Truro made application pursuant to Section 14 of the Municipal Boundaries and Representation Act being chapter 195, R.S.N.S., 1967, as amended. Since Section 14 of that Act mentions Section 13, both are here set out in full:

> "13. Where a town is incorporated the Board may divide the town into not fewer than three wards and if a division is made shall designate the name or number of each ward, shall define the boundaries of each ward, and shall determine the number of councillors for each ward.
>
> 14. (1) Notwithstanding the provisions of any general or special Act, upon the application of the Minister or a municipality authorized by a resolution of the council thereof, or of one hundrd [hundred] ratepayers of a city or town or fifty ratepayers of a municipality other than a city or town, the Board by order may
>
> (a) divide or redivide a city or incorporated town into wards in the manner provided in Section 13;
>
> (b) divide or redivide a municipality, other than a city or incorporated town, into polling districts;
>
> (c) amend the boundaries of any ward or polling district;
>
> (ca) dissolve the wards or polling districts of a municipality;
>
> (d) determine the number of aldermen or councillors for each ward or polling district; and
>
> (e) determine the date upon which the division, redivision, amendment or determination shall take effect.
>
> (2) In settling and determining the number and boundaries of wards and polling districts and the number of aldermen or councillors for each ward or polling district, the Board shall give consideration inter alia to population

density."

No one objected to the Board's jurisdiction to hear the application on its merits.

David Gordon Gilroy, long time Town Clerk of Truro, gave sworn evidence relating to his training and experience, the proceedings before Truro Town Council leading to this application and the need for redistribution to attain equality of voting power among the municipal voters in Truro.

Mr. Gilroy described the current distribution of voters among the three wards of the Town as follows: Ward 1 - 4,230 voters; Ward 11 - 2,604 voters; Ward 111 - 2,546 voters. He explained that the existing ward boundaries dated back to a 1915 Town By-law.

Mr. Gilroy stated that in order to more equitably distribute the electors in the Town's wards the Council requested that the ward boundaries be amended to read as follows:

> "WARD NUMBER ONE
>
> To include all that portion of the Town lying to the west of a line extending in a southerly direction from the Salmon River through the center line of Park Street, through the center line of Queen Street, through the center line of Commercial Street, through the center line of Willow Street where it intersects with Arthur Street, thence along the center line of Kaulback Street to Glenwood Drive, thence easterly along the center line of Glenwood Drive to the northward straight line prolongation of the center line of Curtis Drive, thence southerly along the center line of Curtis Drive and its southward straight line projection to

the south Town boundary.

WARD NUMBER TWO

All that portion of the Town lying to the east of the Ward One boundary and to the west of a line from Salmon River in a southerly direction through the center line of Lorne Street to Prince Street, easterly along the center line of Prince Street to Young Street, thence along the center line of Young Street to the south Town boundary as shown on a street map of the Town of Truro drawn by A.J. MacKinnon dated March, 1984, and filed as Exhibit T-6.

WARD NUMBER THREE

All that portion of the Town lying to the east of a line from Salmon River in a southerly direction through the center line of Lorne Street to Prince Street, easterly along the center line of Prince Street to Young Street, thence along the center line of Young Street to the south Town boundary as shown on a street map of the Town of Truro drawn by A.J. MacKinnon dated March, 1984, and filed as Exhibit T-6."

This proposed reallocation of ward boundaries would result in the following voter distribution: Ward 1 - 3,034 voters; Ward 11 - 3,252 voters and Ward 111 - 3,094 voters.

By Order of the Board of Commissioners of Public Utilities dated December 30, 1983, and effective January 1, 1984, a portion of the watershed of the Town was annexed to the Town and became a part of Ward 111. Mr. Gilroy stated that this annexation increased the number of voters in that ward by 88, which figure was included in his calculations.

No one else gave evidence. Truro made the application to the Board and the only submissions.

Based on the statute empowering it, the application presented to it, and the evidence before it, the Board determines as follows:

That it will grant an Order effective June 14, 1985, amending the ward boundaries of the Town of Truro as set out in Appendix "A" and as shown on a street map of the Town of Truro drawn by A.J. MacKinnon dated March, 1984, and filed as Exhibit T-6.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 14th day of June, A.D., 1985.

E Lawrence

ELIZABETH LAWRENCE

RICHARD L. WELDON.

APPENDIX "A"

TOWN OF TRURO

WARD BOUNDARIES AS ORDERED BY NOVA SCOTIA MUNICIPAL BOARD

EFFECTIVE JUNE 14, 1985.

WARD NUMBER ONE

To include all that portion of the Town lying to the west of a line extending in a southerly direction from the Salmon River through the center line of Park Street, through the center line of Queen Street, through the center line of Commercial Street, through the center line of Willow Street where it intersects with Arthur Street, thence along the center line of Kaulback Street to Glenwood Drive, thence easterly along the center line of Glenwood Drive to the northward straight line prolongation of the center line of Curtis Drive, thence southerly along the center line of Curtis Drive and its southward straight line projection to the south Town boundary.

WARD NUMBER TWO

All that portion of the Town lying to the east of the Ward One boundary and to the west of a line from Salmon River in a southerly direction through the center line of Lorne Street to Prince Street, easterly along the center line of Prince Street to Young Street, thence along the center line of Young Street to the south Town boundary as shown on a street map of the Town of Truro drawn by

A.J. MacKinnon dated March, 1984, and filed as Exhibit T-6.

WARD NUMBER THREE

All that portion of the Town lying to the east of a line from Salmon River in a southerly direction through the center line of Lorne Street to Prince Street, easterly along the center line of Prince Street to Young Street, thence along the center line of Young Street to the south Town boundary as shown on a street map of the Town of Truro drawn by A.J. MacKinnon dated March, 1984, and filed as Exhibit T-6.

Re County of Pictou and the Towns of New Glasgow and Stellarton

MUNICIPAL BOUNDARIES--DETERMINING BOUNDARIES BETWEEN MUNICIPAL UNITS--STATUTORY DEFINITIONS--SURVEY--ASSESSMENT BOUNDARIES--OBJECTIONS BY AFFECTED LANDOWNERS--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 20

This is an application by the Municipality of the County of Pictou ("Municipality") for a determination of uncertain boundaries between the Municipality and certain portions of the boundaries of the Town of New Glasgow and the Town of Stellarton. New Glasgow did not contest this application and was not represented. The boundaries the Municipality has applied to have determined are approx. 2 miles along the eastern boundary and 1 mile along the southern boundary of New Glasgow and approx. 2 miles along the southern boundary of Stellarton from the East River to Bear Brook.

HELD: The Board is satisfied that the boundaries should be established and determined as described in the application of the Municipality of the County of Pictou.

The boundaries of the Town of Stellarton are found in s.1 of "An Act to define the boundaries of the Town of Stellarton," S.N.S. 1890, c.117. The issue in this application relating to the boundaries of the Municipality bordering on Stellarton is the location of "the original south side line of lands of John McIntosh" referred to in s.1 of that Act. The Board accepts the evidence on behalf of the Municipality on this point. The Board rejects the opinion on behalf of Stellarton that the boundary line in the disputed area should be the current boundary line for assessment purposes. The Board can discern no statutory authority for that line. The boundary of the Town of New Glasgow is likewise described in two statutes: S.N.S. 1875, c.49 and S.N.S. 1886, c.105. The boundary with New Glasgow proposed in the Municipality's application was objected to by certain residents affected. However, the Board cannot agree that a municipal boundary defined by statute, surveyed in 1936 and re-surveyed in 1982, to which the Town has no objection should be altered at the request of landowners who prefer to be residents solely of one municipal unit or another.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, Ch. 195, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Application by the Municipality of the County of Pictou for the determination of uncertain boundary lines of the Municipality of the County of Pictou bordering on certain portions of the boundary lines of the Town of New Glasgow and the Town of Stellarton.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: CLYDE F. MACDONALD, Q.C., for the Municipality of the County of Pictou

JOHN B. BAKER, Q.C., for the Town of Stellarton

DECISION

A hearing was held by the Board on November 26, 1984, in the Council Chambers of the Municipality of the County of Pictou in Pictou, Nova Scotia, on an application by the Municipality of the County of Pictou, hereinafter referred to as the Municipality, pursuant to Section 20 of the Municipal Boundaries and Representation Act, Ch.195, R.S.N.S. 1967 as amended, for a determination of uncertain boundaries between the Municipality and certain portions of the boundaries of the Town of New Glasgow and the Town of Stellarton. A petition by the Municipality (Exhibit P-1) requesting "the settlement or fixing of uncertain and unknown boundaries of the Municipality of the County of Pictou" dated April 5, 1984, was received by the Board April 9, 1984. At the request of the Board a supplementary petition (Exhibit P-2) dated June 13, 1984, was filed by the Municipality and received by the Board June 18, 1984. The Town of New Glasgow did not contest this Application and was not represented by Counsel at the hearing.

A hearing of this application was originally set down to commence September 18, 1984, by Order of the Board dated August 22, 1984. At the request of the Municipality and with the consent of the Towns of New Glasgow and Stellarton, the hearing which had been scheduled and advertised was adjourned to November 26, 1984, to allow time for further negotiations between the Municipality and the Town of Stellarton in an attempt to resolve their differences over their mutual boundary. These negotiations not having led to agreement between the Municipality and the Town of Stellarton, the Board proceeded with the November 26th hearing.

Counsel for the Municipality filed three Affidavits (Exhibits P-3, P-4, P-5) proving service of the supplementary Petition and Affidavit, and of the Notice of Hearing as directed by the Board, and of the advertisement of the Notice of Hearing in the Pictou Advocate for the originally scheduled hearing, and the advertisement of the adjourned hearing in the (New Glasgow) Evening News and the Pictou Advocate.

Both parties agreed that the application was properly before the Board and the Board assumed jurisdiction to hear the application on the merits.

The application is made pursuant to Section 20 of the Municipal Boundaries and Representation Act which states:

> "20(1) Upon the application of a municipality authorized by a resolution of the council thereof or upon the application of the Minister, the Board if satisfied that the boundary lines of any county, municipality, ward or polling district, are uncertain or that the traces of such boundary lines have disappeared and it is necessary to establish the same anew may by order establish and determine those boundary lines.
>
> 20(2) The application shall specify the nature and cause of the uncertainty or need for determination of the boundary lines and shall contain particulars of the evidence and proofs that are known respecting the existence and location of those lines."

The Supplementary Petition (Exhibit P-2) gives the following reasons for the application:

> "4. The boundary lines of the Municipality of the County of Pictou are uncertain and traces of such boundary lines have disappeared and it is necessary to establish these boundary lines anew.
>
> 5. We are informed by Mr. Otto P. Rosinski of Abercrombie, in the County of Pictou and Province of Nova Scotia, a Nova Scotia Land Surveyor, and we do verily believe, that the boundaries of the Municipality of the County of Pictou, in relation to this Application, are determined by the boundaries of the Towns of New Glasgow and Stellarton, and that in the past, the descriptions of the boundaries of the incorporated Towns of New Glasgow and Stellarton were not accurately described with bearings and distances; the corner points were not described at all and some corner stones were destroyed over the years, and the boundary lines through the descriptions and plans prepared by Mr. Otto P. Rosinski, a Nova Scotia Land Surveyor, have been attempted to be re-established and tied into the Nova Scotia grid system, and the boundary lines and corners have been attempted to be re-established by grid bearings and by accurate electronic measured distances, and all corners have coordinates in reference to the Nova Scotia grid system."

The boundaries which the Municipality of the County of Pictou has applied to have determined are a length of approximately 2 miles along the eastern boundary of the Town of New Glasgow and approximately one mile along the southern boundary of the Town of New Glasgow, also a length of approximately 2 miles along the southern boundary of the Town of Stellarton from the East River to Bear Brook.

On the matter of the Municipality - Town of Stellarton joint boundary, Counsel for the Municipality called two witnesses, Counsel for the Town of Stellarton called seven. On the matter of the Municipality - Town of New Glasgow joint boundary, Counsel for the Municipality called one witness and three area residents gave evidence.

Mr. Otto P. Rosinski, a registered Land Surveyor for 25 years, 17 of which have been spent in Pictou County, surveyed the boundary lines at issue. He gave evidence on his research into the origins of the boundaries between the Municipality and the two towns in the Public Archives of Nova Scotia, the Department of Lands and Forests Crown Lands Records and the Registry of Deeds in Pictou.

The Board first heard evidence on the Municipality's boundary which is the southern boundary of the Town of Stellarton. The metes and bounds description of the proposed boundary accompanied the Municipality's application to the Board (Exhibit "C" of Exhibit P-2). The metes and bounds description of this boundary, running from the west side of the East River of Pictou westerly to Bear Brook (or Fox Brook) correlates with that shown on 4 plans of survey prepared by Mr. Rosinski, numbered (from east to west) 1452-0-83 (Exhibit P-6A), 1452-P-83 (Exhibit P-7A), 1452-Q-83 (Exhibit P-8A), and 1452-R-83 (Exhibit P-9A). The 4 plans of survey are dated November 1983. The Town of Stellarton disputed the boundary as shown on Exhibit P-6A and a portion of Exhibit P-7A only.

Mr. Rosinski stated that the definition of the boundaries of the Town of Stellarton is to be found in Chapter 117 of the Statutes of Nova Scotia passed April 15, 1890 "An Act to define the boundaries of the Town of Stellarton", a copy of which was filed as Exhibit P-18. It states:

> "1. The boundaries and limits of the town of Stellarton are hereby established and confirmed and thus defined; Beginning at the original south side line of lands of John McIntosh, in the western margin of the East River, running thence along the course of said line westerly until it comes to Bear Brook, thence northerly along the eastern margin of Bear Brook, following the different courses of the same until it comes to the public highway leading from Stellarton to Middle River, thence easterly along the southern boundary of said road, until it comes to the junction of the same with the road leading from New Glasgow to Westville, thence along the southern boundary of the New Glasgow road, until it comes to a lane near the residence of Larry McNeil, thence along the south side of said line to the highway leading from Stellarton to New Glasgow, thence easterly by the division line established by the incorporation of New Glasgow to the East River, thence southerly along the western margin of said river to the place of beginning.
>
> The foregoing limits are those defined in the Acts of 1885, as polling section No. 25 in the county of Pictou, now incorporated as the town of Stellarton, and the same are hereby confirmed and established as the legal boundary of said town."

The issue in this application for the determination of the boundaries of the Municipality bordering on the Town of Stellarton is the location of "the original south side line of lands of John McIntosh" which is described as "in the western margin of the East River, running.....westerly until it comes to Bear Brook". Mr. Rosinski described the sources which he consulted and the information he gathered to substantiate the location of the "original south side line of lands of John McIntosh".

Mr. Rosinski traced the boundary line which he believes to be identical to that of the Town of Stellarton described in the above quoted statute back to an original grant line running westward from the East River between lands of Donald McKay, Sr. (450 acres) and Donald Cameron (100 acres) to the north, and lands of Anthony Culton (500 acres) to the south. Mr. Rosinski found these grants recorded in Book 13, Page 12, dated November 17, 1783, in the Crown Lands Records in Halifax, as also shown on Crown Lands Index sheet No. 87 (Exhibit P-21). By 1818, he found that the Donald Cameron grant had been conveyed to Donald McKay, leaving lands to the north of the line in the ownership of Donald McKay and to the south of the line in the ownership of Anthony Culton.

In 1818, Donald McKay conveyed to Roderick McKay 220 acres described as running west one mile from the East River over Robert Culton's farm lot to an old pipe. Mr. Rosinski marked the location of the old pipe on Exhibit P-8A at co-ordinates N16,553,077.30, E696,783.55.

Mr. Rosinski filed as Exhibit P-32, a copy of a petition to the House of Assembly dated January, 1843, by "a number of inhabitants of the Township of Egerton in the County of Pictou" requesting the separation of the township into two parishes. The suggested limits of the Albion Mines Parish are as follows:

> "....on the North by the upper or south line of William Fraser Oags land on the West by the division line between the East and Middle River on the South line of the lands of the late Roderick McKay and on the East by the courses of the East River."

Mr. Rosinski stated that Stellarton became the name of the community formerly known as Albion Mines on February 1, 1879.

To further establish the original grant line of 1783 between McKay/Cameron and Culton as the proper southern boundary of the Town of Stellarton, Mr. Rosinski traced the conveyance of various parcels of land in the vicinity of the original grant line, in particular a 9 acre lot and a 13 acre and 64 square rod lot. The 9 acre lot lay west of "The Road leading from Albion Mines to the West Branch" (now Foord Street), having the original grant line as its northern boundary; it was conveyed by the General Mining Association to William Calder in 1843 and by his widow to John MacIntosh in 1875. The 13 acre and 64 square rod lot ran west from the East River having the original grant line as its southern boundary; it was conveyed by the General Mining Association to William Calder in 1843 and by his widow to John MacIntosh in 1875. Both these lots were conveyed to the Crown on June 5, 1877 by John MacIntosh and his wife as security for performance of a construction contract in Prince Edward Island.

Mr. Rosinski stated that following the Act of 1890 which defined the Town boundary of Stellarton, John MacIntosh conveyed to the Town on December 31, 1892, a lot of land described as being "near the southern limits of the Town of Stellarton as now defined", lying between the Inter-Colonial Railway and the East River, and in October 1893, John MacIntosh was awarded $180.00 for lands "bounded....on the south by lands of the said Town of Stellarton".

In cross-examination, Mr. Rosinski agreed that there was no record of John MacIntosh owning land in the vicinity of this portion of the town boundary prior to 1873. A copy of a page from the Pictou County Atlas of 1879 was filed in evidence as Exhibit P-22 and Mr. Rosinski outlined on the exhibit the base line or grant line which ended at the western boundary of the John MacIntosh lands. These lands which are shown extending westward from the East River straddle the prolongation of the grant line to the river and are shown to be 30 acres. Mr. Rosinski did not accept the accuracy of Exhibit P-22, contending that the author was not a land surveyor, that it appeared to be more a sketch than a plan and that it did not appear to be tied to a Crown land monuments. Mr. Rosinski submitted that if the southern boundary of the town was the south boundary of the John MacIntosh "composite lands" (the 9 acre lot and the 13 acre, 64 square rod lot) as shown on the Pictou County Atlas sketch, then the description of the town boundaries would have mentioned the brook flowing into the East River which forms the southern boundary of the southernmost lot.

James Clattenburg, Clerk of the Municipality of the County of Pictou for the past 3 years and previously Deputy-Clerk Treasurer for the Town of New Glasgow for 14 years, gave evidence for the Municipality. Mr. Clattenburg was asked to give information on a water supply line installed in 1981 at the

Municipality's expense to service the Riverton Adult Residential Centre in the Municipality on the west side of South Foord Street (or the Trafalgar/Stellarton Highway as it is called on Exhibit P-6A prepared by Mr. Rosinski). On a site plan which is part of Exhibit P-23, a set of drawings prepared in May 1981 by CBCL Limited for the Pictou District Planning Commission, Mr. Clattenburg marked the spot where the 14" diameter water main joins an existing 16" water main in the Town of Stellarton. A letter from Freeman C. Coffin, an engineer with the firm of Lee & Coffin, Civic and Hydraulic Engineers in Boston, dated August 6, 1900, to "The Commissioners of Pictou County Asylum", filed as Exhibit P-24, stated that the distance from the "Pumping main of the Stellarton Water Works where it crosses the street at the nearest point to the Asylum" to the Asylum (now the Riverton Home) is 3850 feet. Mr. Clattenburg contended that the 14" and 16" water mains were joined at approximately the town boundary.

The first witness for the Town was Albert MacCallum, a 30 year resident of Stellarton who has practised there as a licensed land surveyor since 1967. A plan drawn by Mr. MacCallum, dated May 30, 1984, showing "lands assessed by the Town of Stellarton, South Foord Street, Stellarton", was filed as Exhibit P-28. Mr. MacCallum explained that the line A-J on Exhibit P-28 was the same as the grant line between MacKay (north) and Culton (south) as previously drawn and explained by Mr. Rosinski. Mr. MacCallum stated that the line A-J on Exhibit P-28 is the south line of the 13 acre 64 square rod lot of John MacIntosh mentioned in previous evidence, and that the 9 acre lot of John MacIntosh lay to the south of the line A-J on the west side of Foord Street as outlined by him by the letters A, B, C and D. To the east of the railroad (which lies east of South Foord Street) Mr. MacCallum outlined a 13 acre lot between the railroad and the west bank of the East River which had been conveyed by Robert Culton to John MacIntosh on April 19, 1875 and recorded in the Registry on April 29, 1875. Mr. MacCallum stated that the Southern boundary of this 13 acre lot was a brook flowing into the East River which he marked as a line S-T on Exhibit P-28.

Mr. MacCallum said that he believed the brook, known as Culton's Brook, was the south line of the John MacIntosh property in 1890 when the southern town boundary was defined by Statute as "beginning at the original south side line of the lands of John McIntosh in the western margin of the East River, running thence along the course of said line westerly until it comes to Bear Brook ....".

For assessment purposes, Mr. MacCallum explained that the Town boundary is considered to run from point A to B, C and D on the west side of South Foord Street, as shown on Exhibit P-28, and between points E and F being respectively on the east side of South Foord Street and the west side of the Canadian National Railway (Hopewell Subdivision) right-of-way, and finally between points G and H being respectively on the east side of the said CNR right-of-way and the west bank of the East River. The Line G-H, running due east and west, lies to the north of

Culton's Brook and midway between that brook and the original grant line A-J which Mr. Rosinski on behalf of the Municipality, advocated as the town boundary. Mr. MacCallum acknowledged that the line E-F, running between South Foord Street and the railway right-of-way followed a small brook, but that there are no natural features or markings on the ground to indicate the line G-H. The lines between the points A, B, C and D follow an old stone fence line he said.

In Mr. MacCallum's opinion, the sketch in the Pictou County Atlas (Exhibit P-22) showing the shape and extent of John MacIntosh lands is a "fair representation" of Mr. MacCallum's depiction of those lands.

In cross-examination, Mr. MacCallum acknowledged that he had great difficulty with the word "original" in deciding which MacIntosh south line should be considered "the original south side line of the lands of John McIntosh" referred to in the Statute defining the town boundaries. Since John MacIntosh owned several parcels of land, Mr. MacCallum considered that he had two south lines, one to the west of the river and one to the west of the road (now South Foord Street). Mr. MacCallum stated that he believed the boundary between the two units (the town and the Municipality) should be along the line between the points A, B, C, D, a prolongation of D to E, F, a prolongation of F to G, and H as shown on Exhibit P-28. This line represents the current actual boundary for assessment purposes between the Municipality and the Town.

Mr. Robert Hoegg, a resident of Stellarton for over 60 years and the Superintendant of Public Works for the Town for 18 years, gave evidence on the extent of town servicing in the disputed boundary area. Referring to Exhibit P-28, Mr. Hoegg stated that the town services extended to approximately point "D" and that the Elmer Way house to the north of that point was the most southerly house serviced. The 16 inch water main referred to by Mr. Clattenburg ended 75 feet north of the (Hugh Ross) MacIntosh driveway. Mr. Hoegg said that point "D" marked the end of the town's sidewalk, water service and road repairs.

Donald Ross MacIntosh (grandson of John MacIntosh), Elmer Way and Charles Russell - all property owners on the west side of South Foord Street between the Municipality's proposed boundary line A-J and the actual boundary line for assessment purposes - gave evidence that their properties were assessed in the Town of Stellarton and received municipal services from the Town and that they preferred to remain in Stellarton. A statutory declaration to the same effect by the only other property owner in the subject area, Barry Evans and his wife, was filed as Exhibit P-30.

Mr. Adrian Pearson, Town Clerk for Stellarton for 10 years, confirmed by means of a copy of a page from the Assessment Roll for Ward 1 in the Town of Stellarton in 1934 (Exhibit P-31) that the estate of Hugh Ross MacIntosh (son of John MacIntosh) had been assessed in the town at least as far back as 1934.

Mr. Merle Gordon, Chief Assessor in the Pictou County assessment region, is responsible for the assessment of the

Town of Stellarton. He confirmed that he uses the line shown on Exhibit P-28 between points A,B,C,D,E,F,G and H as the boundary between the Town and the Municipality, because of instructions from his predecessor in the position which he had no reason to disbelieve.

On the merits of a portion of the Municipality's proposed boundary with the Town of New Glasgow, Counsel for the Municipality again called Mr. Rosinski to give evidence. The Town of New Glasgow was not represented. Three residents affected by the proposed boundary between the Municipality and the Town gave evidence and Councillor Allister MacDonald spoke on their behalf.

In surveying the boundary between the Municipality and the Town of New Glasgow, Mr. Rosinski relied on the descriptions of the boundary of the Town found in two Statutes, as follows:

> [from an Act to Incorporate the Town of New Glasgow, Chapter 49, S.N.S. passed May 6, 1875]
>
> "3. The boundaries and limits of the said Town of New Glasgow shall be the following, to wit: On the south the southern line of Daniel McDonald's property continued westwardly and eastwardly until it meets the eastern and western boundaries hereinafter mentioned. On the north the northern line of David Rose's property continued eastwardly and westwardly until it meets such eastern and western boundaries. On the east and west lines running parallel to the course of East River at a distance of one mile from such river in each direction."

> [from An Act to Consolidate and amend the Acts relating to the Town of New Glasgow, Chapter 105, S.N.S. passed May 11, 1886]
>
> "SCHEDULE A"
>
> The boundaries and limits of the town of New Glasgow shall be as follows: - Commencing at high water mark of the East River, on the north-west corner of farm lately owned and occupied by David Rose, now the property of Harry Townsend, thence running south forty-two degrees east one mile to a stone, thence south twenty-nine degrees west till it comes to a stone on the old telegraph road, or Lorne street, thence south thirty-three degrees, thirty minutes west until it comes to a stone on the south line of John Ross' property, thence along said line north forty-one degrees and thirty minutes, west 82 chains, or until it comes to the west side of the East River, thence north-westerly along said river until it comes to the south line of the property of the late William Duff, thence along said line north eighty-four degrees, west sixty chains until it comes to a stone, thence north twenty-nine degrees east until it comes to a stone on the north line of William McIntosh's farm, one mile from the river, thence along said line south eighty-four degrees, east eighty chains until it comes to the river, thence across the river to the place of beginning."

As well, Mr. Rosinski consulted a plan of survey completed in January, 1936, by Aubrey G. McKay, a provincial land surveyor. This survey was described in copies of two letters from McKay to the Mayor and Councillors of the Town of New Glasgow filed as Exhibit P-36. Mr. Rosinski stated that he had found most of the markers described by Mr. McKay and had, in effect, re-established McKay's 1936 line which had been based on the description in the 1886 statute.

The boundary line surveyed by Mr. Rosinski is shown on 7 plans of survey dated November 30, 1983, and filed as Exhibits P-10 to P-16. The metes and bounds description of this boundary, running south along the eastern boundary of the Town of New Glasgow and then west along the Southern boundary of the Town of

New Glasgow, Exhibit "B" of the Municipality's application to the Board, is in accordance with the proposed boundary shown on the 7 plans prepared by Mr. Rosinski which are numbered respectively 1452-H-82 (Exhibit P-10), 1452-I-82 (Exhibit P-11), 1452-J-82 (Exhibit P-12), 1452-K-82 (Exhibit P-13), 1452-L-82 (Exhibit P-14), 1452-M-82 (Exhibit P-15), 1452-N-82 (Exhibit P-16).

The portion of the boundary between the Municipality and the Town of New Glasgow which the Municipality wishes to have determined begins at the northeast corner of the Town of New Glasgow (which is also the southeast corner of the Town of Trenton) and runs southwest for approximately 12,736 feet, then northwest along the southern boundary of the Town of New Glasgow for approximately 5065 feet to the shoreline of McLellan's Brook where the brook joins the East River of Pictou.

Mrs. Lee Pellerine is a 12 year resident of Fraser's Mountain. She and her husband Gerard own a residential property on Mountain Road. Mrs. Pellerine gave evidence on the effect the Municipality's proposed boundary would have on their property. Mr. & Mrs. Pellerine own Lot "B" of the lands of R.M. Gerald Pellerine as shown on a plan of survey showing "land claimed by P. Paul Pellerine", prepared by O.P. Rosinski and dated May 9, 1972, which was filed as Exhibit P-34. Mrs. Pellerine said that she and her husband had always believed that their property was the first property outside the town boundary on Mountain Road. She stated that they have been assessed in the Municipality and paid taxes to the Municipality for 12 years and have been on voters' lists for elections in the Municipality. Mrs. Pellerine was opposed to the proposed boundary which would divide her property so that most of her house and at least half of her land would be located in the Town. Mrs. Pellerine expressed a strong preference for being a property owner in the municipality, particularly since town taxes would be considerably higher than the taxes which she and her husband now pay to the Municipality. Mrs. Pellerine believed she would receive few if any services from the Town in compensation for higher taxes.

Mr. James A. Pellerine, owner of a residential property located to the south of the Gerard and Lee Pellerine property, which he purchased in 1952, stated similar objections to the proposed boundary which would place a small portion of his 250' x 90' property within the Town. Mr. John Richards, who lives on a property fronting on Mountain Road lying between the James Pellerine property and the Gerard and Lee Pellerine property also expressed concerns about the proposed boundary which would place a portion of the property occupied by him within the Town. Mr. Richards does not have a deed to the property on which he resides and for which he has paid taxes to the Municipality for 28 years.

Councillor Allister MacDonald who represents District 10 in the Municipality supported the position of the area residents who had presented their objections to the proposed boundary between the Town of New Glasgow and the Municipality. He pointed out that the previous year's tax rate for the town was $2.15 while the municipality's rate was $0.74, and that unlike the property owners who might be affected by the proposed boundary between the Municipality and the Town of Stellarton, the property owners on the New Glasgow boundary would face much higher taxes if the Municipality's application were approved.

The Board has carefully perused the application of the Municipality and considered the evidence adduced at the hearing and the post-hearing submissions. The Board is satisfied that portions of the Municipality's boundary lines with the Towns of New Glasgow and Stellarton are uncertain and need to be re-established and determined. Notwithstanding the evidence led by the Town of Stellarton and the evidence presented by some residents in the area of a portion of the proposed boundary between the Municipality and the Town of New Glasgow, the Board is persuaded by the evidence and argument of the Municipality that the boundaries of the Municipality bordering on certain portions of the Town of Stellarton and the Town of New Glasgow as described in Exhibits "B" and "C" of the application should be approved.

In the matter of the boundary between the Municipality and the Town of Stellarton, the Board accepts the evidence of Mr. Rosinski that the most logical location of the boundary line to coincide with the description in the 1890 Statute defining the southern boundaries of the Town of Stellarton as "the original south side line of lands of John McIntosh" is the original grant line or base line between the lands of Donald McKay Sr. and Donald Cameron on the north and the lands of Anthony Culton on the south. The Board heard no evidence that the proposed boundary did not accurately represent this grant line as set out in Book 13, Page 12, November 1783 in the Crown Lands Records and as shown on Crown Lands Index Sheet #87.

Whether or not Mr. Rosinski is exactly correct in his location of the boundary line in the area of dispute, the Board was impressed with the research carried out by Mr. Rosinski and considers his evidence to be the better evidence of its location. The Board accepts his argument that the wording in the Statute defining the town boundaries most logically leads to the assumption that the southern town boundary was a more or less straight line running west from the East River to Bear Brook. The most probable location of that straight line westerly from the river is the original McKay/Cameron-Culton grant line. The opinion of Mr. MacCallum, Surveyor, that the "original South side line of lands of John McIntosh in the western margin of the East River" was along the course of Culton's Brook, is difficult to rationalize with the Town's acceptance of the grant line for the major portion of the proposed boundary. Mr. MacCallum gave no explanation of how a boundary line following the course of Culton's Brook westward from the East River would connect to the grant line which lies some distance to the north and west.

The Board rejects the opinion of Mr. MacCallum that the portion of the boundary line in the disputed area should be the current boundary line for assessment purposes between the town and the Municipality. The Board can discern no statutory authority for that line, especially in the area immediately west of the East River.

In the matter of the objections of certain residents affected by the proposed boundary between the Municipality and the Town of New Glasgow, the Board cannot agree that a municipal boundary defined by Statute, surveyed in 1936 and re-surveyed in 1982, to which the Town has no objection should be altered at the request of landowners who prefer to be residents solely of one municipal unit or another. If the principle were accepted that any landowner along a municipal boundary could choose to be a property owner of whichever unit he preferred and the boundary adjusted accordingly, the result would be very complex and irregular boundaries which would make the administration of municipal services and electoral procedures unnecessarily difficult. The Board heard no evidence that the proposed boundary between the Municipality and the Town of New Glasgow did not accurately represent the boundary of the Town of New Glasgow as defined by Statute.

The Board is satisfied that the boundaries of the Municipality of the County of Pictou bordering on certain portions of the Town of Stellarton and the Town of New Glasgow should be established and determined as described in Exhibits "B" and "C" attached to the application of the Municipality and as shown on the plans of survey prepared by Otto P. Rosinski which accompanied the application.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 14th day of June, A.D, 1985.

RHBlois

R.H. BLOIS, Q.C.

E A Lawrence

ELIZABETH LAWRENCE

Darryl W. Wilson

DARRYL W. WILSON

Re District of Argyle

MUNICIPAL REPRESENTATION--AMENDMENTS TO BOUNDARIES OF POLLING DISTRICTS--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 14

This is an application by the Municipality of the District of Argyle for approval of amendments to the boundaries of its polling districts. No one appeared in opposition to the application.

HELD: The Board approves the amendments requested.

The Board is satisfied on the evidence that the Municipality is entitled to have the boundaries of polling districts 15, 16, 17, 18 and 20 & 20A amended. It notes, however, that it is required to give consideration to population density. There is a large difference between the number of voters in District 19 and District 20 and the number of voters in District 21 was substantially greater than in other districts except District 19. The Board recommends further study to determine the fairness and reasonableness of the number of Councillors to be elected from each district. It confirms the bounds of Districts 14, 19 and 21 and confirms that one Councillor shall represent each of the eight polling districts.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, R.S.N.S. 1967, c. 195;

- and

IN THE MATTER OF: The Application by the Municipality of the District of Argyle for approval of the alteration in the boundaries of polling districts in the Municipality.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: ANDREW S. NICKERSON, LL.B., for the Applicant.

DECISION

The Municipal Council of the Municipality of the District of Argyle (hereinafter called the Municipality) made application to the Board by way of Petition dated February 12, 1985, under Section 14, s.s. (1)(c) of the Municipal Boundaries and Representation Act, R.S.N.S. 1967, c. 195 for approval of certain proposed amendments to the boundaries of its polling districts.

The Board by order dated March 14, 1985, set the application down for a hearing to be held in the Board Room of the Municipal Office at Tusket, Yarmouth County, on Wednesday, April 10, 1985, at 9:00 a.m. The Board in its order of March 14, 1985, provided that Notice of the application be advertised by three insertions to appear in the "Vanguard" newspaper on March 20th, March 27th and

April 3, 1985, and also by three insertions to appear in the "Le Courrier" newspaper on the same dates. The applicant was also ordered to send Notice of the application to John Mullally, the Deputy Minister of Municipal Affairs.

At the hearing no one appeared in opposition to the application and the Board being satisfied that the hearing had been properly advertised and Notice given, proceeded to hear the application.

The Municipality's Petition was filed as Exhibit A-1. It indicated that the existing polling districts of the Municipality had been determined and approved by orders of the Board of Commissioners of Public Utilities dated May 10, 1976 and December 10, 1981. There are at present eight polling districts numbered 14, 15, 16, 17, 18, 19, 20 & 20A and 21 each represented by one Councillor. District 20 and 20A is made up of two geographic areas with District 16 lying between them.

The Board notes that the Board of Public Utilities in its decision dated November 8, 1966 respecting an application by the Municipality for approval of changes in its boundaries observed that "at first consideration it seemed to the members of the Board that it was not rational to combine these two districts (20 and 20A) in the one polling district but upon further consideration it is the Board's conclusion that in these days of rapid and adequate transportation the consideration of distance alone should not determine the withholding of the Board's approval of the Municipality's request to combine these two districts to form one polling district if upon other valid considerations the plan is a practicable and rational one". The Board approved of the Municipality's application to combine districts 20 and 20A into one polling district. Descriptions of the boundaries of the eight existing polling districts of the Municipality are set out in Exhibit "A" to the Petition.

Paragraph 2 of the Petition states:

> "THAT the Municipality of the District of Argyle has encountered difficulties with the present approved boundaries in that some of the reference points in such descriptions are no longer easily identifiable and in that some ratepayers have complained to the Council that they do not vote in a district which has the most community of interest with them;".

Attached to the Petition as Exhibit "B" is a true copy of a Resolution of the Council passed on September 11, 1984, authorizing this application.

The boundary changes proposed by the Applicant affect five of the eight polling districts, namely, districts 15, 16, 17, 18 and 20 & 20A, and in summary form are as follows:

(1) a portion of District No. 18 to become part of District No. 17;

(2) a portion of District No. 17 to become part of District No. 18;

(3) a portion of District No. 17 to become part of District No. 16;

(4) a portion of District No. 20 & 20A become part of District No. 16;

(5) a portion of District No. 16 to become part of District No. 20 & 20A;

(6) a portion of District No. 15 to become part of District No. 20 & 20A.

At the commencement of the hearing Counsel for the Municipality informed the Board that the application was in the nature of a housekeeping matter.

Evidence was given by Gerald Pottier, Gerald Doucet and Arnold D'Eon.

Gerald Pottier is a Municipal Councillor and is employed by the Province of Nova Scotia. He is qualified and licenced as a Nova Scotia Land Surveyor and is a member of a committee appointed by the Council to review the Municipality's polling district boundaries. This Committee gave a report to the Council which recommended changes in the boundaries of five of the Municipality's Polling Districts. The Council approved the Committee's recommendation and authorized this application.

Mr. Pottier identified a number of maps prepared by him showing existing polling district boundaries and proposed boundaries. Exhibit A-2 is a map showing the existing boundaries of that portion of District 20 & 20A known as 20A outlined in green and the proposed boundaries of 20A outlined in yellow. Also shown on Exhibit A-2 coloured brown are the three proposed changes affecting the boundaries of District 20A. They are as follows:

(1) a parcel of land presently in District 16 to become part of 20A, this parcel being bounded on the north by Gavelton Road, on the east by Quinan Back Road, on the south by the C.N.R., and on the west by the existing boundary

of District 20A;

(2) a parcel of land presently in District 20A to become part of District 16. This parcel is located at the southeast corner of the existing boundaries of District 20A and is bounded on the northeast by Abrams River and on the south by the Road to Abram's River.

(3) a parcel of land presently in District 15 to become part of District 20A. This parcel is bounded on the north by the southern boundary of the existing District boundary, on the east by the west base line of the John Breyton grant line, on the south by the property of Lester Muise, and on the west by the existing boundary of District 20A.

Mr. Pottier explained that the map filed as Exhibit A-2 was slightly in error in that the area of land presently in District 15 and proposed for District 20A was a slightly larger area than the area shown in brown on the map. He then marked on the map an area cross-hatched in black as an area which should be included in the area proposed for District 20A and presently part of District 15. This additional area is west of and adjacent to the area shown in brown.

Mr. Pottier made it clear that the error in the map was his error and that the Council had included the area cross-hatched in black in its recommendation as forming part of District 20A.

Mr. Pottier explained that there were six families living in this area who identified themselves with the Village of Tusket lying in District 20A and they would prefer to be in District 20A.

Exhibit A-3 is a map showing a portion of the present boundaries of District 16 outlined in green and a portion of proposed boundaries of District 16 outlined in orange. Also shown on Exhibit A-3 coloured brown are two parcels of land, one now in District 17 and the other now in District 20A proposed to be included in District 16. The first of these two parcels includes land on the west side of Herring Brook and also includes a portion of Eel Lake. The second parcel includes land south and west of Abram's River.

Exhibit A-4 is a map showing a portion of the existing boundaries of District 18 coloured green and a portion of the proposed boundaries of District 18 coloured yellow. Also shown on Exhibit A-4 are two parcels of land coloured brown, one parcel presently in District 18 proposed to become part of District 17 and the other parcel presently in District 17 proposed to become part of District 18.

Mr. Pottier explained that the area shown in brown on Exhibit A-2 now part of District 20A and proposed for District 16 contains three homes. These persons are presently located in District 20A and are part of the Village of Tusket. They had indicated that they did not want to be part of the Village of Tusket and had refrained in the last municipal election from voting because they did not wish to be in the Village of Tusket. Mr. Pottier explained that District 20A "more or less represents all

District No. 21 1,011

6,128"

Mr. Doucet stated that these were the most accurate population figures he had. He was asked to comment about some of the proposed changes in areas in which he had some personal knowledge. In particular he was asked about the area in District 17 to be added to District 18 and the area in District 18 to be added to District 17. His response was that:

> "The knowledge that I have on this one came about from my being the returning officer in the last municipal elections and this is one of the areas where this is the area where we were petitioned from the ratepayers at that time, in this area here - the proposed 18 to 17. These people, as was previously mentioned, were concerned that they were forced or they had to vote in a District in which they felt they had no common interest and this was relayed to me both by the enumerators and by some of the residents at that time."

With respect to the area in District 20A proposed to become part of District 16 Mr. Doucet indicated that only two or three homes were affected. He indicated there was no application from the residents for this particular change. It was "purely the committee's own suggestion" in order to "have an identifiable line as the old description was vague".

With respect to the parcel presently in District 16 and proposed for District 20A (the Gavelton area) Mr. Doucet stated that "this is an area that we were having problems in that the residents in that area were identifying of the Village of Tusket".

Mr. Pottier in explaining why the Committee of the Council recommended these changes to the Municipality's district boundaries stated that the changes were in response to residents who requested the changes. The numbers of persons in each of the areas in question were minimal and in all cases the changes would result in residents being relocated to districts of their preference.

In response to a question from the Board as to whether anybody had objected to the proposed changes, Mr. Pottier replied that there were no objections. Counsel for the Municipality asked Mr. Pottier if he was "aware of any negative reaction that any councillor got" and he replied "no I am not".

Evidence was also given by Gerald Doucet the Municipal Clerk for the Municipality of Argyle. Mr. Doucet identified Exhibit A-5 which is a summary of the number of voters in districts 14 - 21 inclusive for the year 1982 being the year of the last municipal election, which had been prepared by the witness. It reads as follows:

"District No. 14	587
District No. 15	888
District No. 16	695
District No. 17	631
District No. 18	533
District No. 19	1,335
District No. 20	448

more with that community as opposed to the District that they were being forced to vote in municipal elections..."

Mr. Doucet stated that he had personally received complaints from some residents in the South Belleville area presently in District 17 and proposed for District 16 shown on the map filed as A-3. These complaintants expressed the view that they had to vote in an area in which they had no interest. These were verbal complaints.

Mr. Doucet stated that he was satisfied that the proposed changes would alleviate the problems complained of. When asked by the Board if the Committee gave any thought to the number of Councillors in relation to the number of voters in the various Districts Mr. Doucet stated that both the committee and the Council had discussed this matter on several occasions but at this time they felt that they "should only deal with minor changes and not the other aspect of it, not the re-arranging of the number of Councillors". The Board pointed out to Mr. Doucet that according to the 1982 summary of voters list (Exhibit A-5) District 19 had 1,335 voters which was the largest number in any district while District 20 had only 448 voters yet each district was represented by one Councillor. Mr. Doucet agreed that this indicated an imbalance in the number of voters for these districts and pointed out that District 20 with the smallest number of voters was geographically the largest district and would have the highest assessment next year.

Mr. Doucet further pointed out that there were basically two communities in District 20, one community being in the Tusket area and the other being the Kemptville area.

The Board pointed out to Mr. Doucet that from the 1982 summary of the number of voters in each district, number 21 with 1011 voters had nearly twice as many voters as number 20 with 448 voters. Mr. Doucet stated that the proposed changes to certain district boundaries would not cause any significant changes in the numbers of voters in the affected districts. He reiterated that the proposed changes were merely of a housekeeping nature.

Arnold D'Eon, a resident of District 17 and a plumber by occupation gave evidence. He appeared as an interested resident and not as a witness for the municipality. Mr. D'Eon indicated the location of his property by marking it on the map filed as Exhibit A-4. He said he agreed with the changes in boundaries proposed by the municipality and said that his property is closer to the main community of Pubnico in District 18 than to the nearest community of people at Argyle in District 17. He said he and the residents of five other houses on the Pubnico Back Road wished to be in District 18. Mr. D'Eon had obtained a petition requesting that this area should become part of District 18 from the other five households all of whom signed it except one person who refrained from doing so.

At the request of the Board, Mr. Pottier was asked to file with the Board an Affidavit setting forth the metes and bounds descriptions of the proposed new boundaries. Counsel for the Municipality forwarded to the Board an Affidavit sworn by Mr. Pottier on May 14, 1985, in which he states that he has "reviewed the descriptions of the new proposed boundaries which are attached hereto as Schedule "A" and that he believes "that the descriptions are clear, accurate and suitable for the purposes for which they are intended". Attached to Mr. Pottier's Affidavit are the metes and bounds descriptions of all eight polling districts in the Municipality containing changes proposed for districts 15, 16, 17, 18 and 20 & 20A.

The Board is satisfied on the evidence that the Municipality is entitled to have the boundaries of polling districts 15, 16, 17, 18 and 20 & 20A amended under the provisions of s.s. (1)(c) of Section 14 of the Municipal Boundaries and Representation Act, R.S.N.S. 1967, c. 195. The Board, however, notes that in determining boundaries of polling districts it "shall give consideration inter alia to population density" under s.s.(2) of Section 14 of the Municipal Boundaries and Representation Act. In that regard the Board has pointed out the large difference between the number of voters in District 19 and the number of voters in District 20 according to the 1982 Summary of Voters Lists (Exhibit A-5). It is also to be noted that the number of voters in District 21 in 1982 was substantially greater than the number of voters in the other districts except District 19. The Board therefore recommends that the Municipal Council conduct a further study of the number of voters for each polling district for the year 1985 in order to determine the fairness and reasonableness of the number of Councillors to be elected from each district and to make a further application to the Board if deemed necessary by the Municipality.

The Board approves effective August 2, 1985, the polling district boundary changes requested by the Applicant which affect districts 15, 16, 17, 18 and 20 & 20A and the Board approves the following metes and bounds descriptions of these five districts as they are set forth in Exhibit "A" of Mr. Pottier's Affidavit which incorporate the various boundary changes requested viz:

DISTRICT NO. 15 **ONE COUNCILLOR**

Hubbard's Point, Amirault's Hill, Sluice Point and the Islands

BEGINNING at Tusket at the South line of Arthur Marster's land on the Eastern shore of the Tusket River;

THENCE following said line and the South line of Wilbur Wood's and Horatio Wood's land in an Easterly direction to the Main Post Road;

THENCE crossing said Main Post Road and running Easterly along the prolongation of Lester Muise's South line to the John Breynton Grant's West Base Line;

THENCE running in a Southerly direction along said West Base Line to the shore of Indian Bay;

THENCE running in a Southerly direction along the shore of said Indian Bay to Beach Point;

THENCE running in an Easterly and Southerly direction to include Morris Island, Hog Island, Surette's Island and Eatall Island;

THENCE running in a Northwardly direction along the Eastern shore of the Tusket River to the South line of Arthur Marster's land and the place of beginning.

DISTRICT NO. 16 **ONE COUNCILLOR**

Abram's River, Ste Anne Du Ruisseau, The Bellevilles, Bell Neck, Springhaven and The Quinans

BEGINNING at the Southern extremity of John Breynton Grant West line at Indian Bay;

THENCE running Northwardly along said John Breynton Grant West line to Nova Scotia Route No. 3;

THENCE running Easterly along the middle of said Route No. 3 to a point being 1744 feet Easterly from the intersection of the Abram's River Road and Route No. 3, and also being the Westerly boundary of lands of Raymond LeBlanc;

THENCE along the Westerly boundary of lands of Raymond LeBlanc in a Northeasterly direction to the Abram's River;

THENCE running in a Northwardly direction along the shore of Abram's River and a brook as far North as the Tusket to Gavelton base line;

THENCE running in a straight line Northwestwardly direction to the C.N.R. Railway right-of-way;

THENCE in a Northeasterly direction along the C.N.R. Railway right-of-way to the back road leading from the Main Quinan Road to the Gavelton Road;

THENCE in a Northerly direction along the aforementioned back road to a point 300 feet Southerly from the intersection of the Gavelton Road with the said back road;

THENCE in a Northeasterly direction along a line parallel to and 300 feet from the Gavelton Road to the Tusket River;

THENCE following the winding courses of the Tusket River to the old site of Moody's Mill on the Tusket River;

THENCE by a line running due East from said Moody's Mill site to the Shelburne County line;

THENCE running in a Southwestwardly direction along said Shelburne County Line to District No. 17;

THENCE running Northwestwardly and Westwardly along District No. 17 to a point where Herring Brook (so-called) flows out of Pothier's Mill Pond;

THENCE in a Southerly and Westerly direction following the several courses of Herring Brook (so-called) to Highway 103;

THENCE Southerly along the Westerly boundary of Highway 103 until it meets Eel Lake;

THENCE in a Southerly, Easterly and Northwesterly direction following the various courses of the Southern and Western shores of Eel Lake to the Eel Brook bridge;

THENCE running Southwardly and Northwardly around Rocco Point and Beach Point to the Southern extremity of John Breynton Grant West line and the place of beginning.

DISTRICT NO. 17 **ONE COUNCILLOR**

The Argyles, a portion of Argyle Sound, Lower Eel Brook

BEGINNING at a point at Argyle Sound where the Argyle Sound Cross Road strikes the shore of Lobster Bay;

THENCE running in a Southwardly, Westwardly direction in the Lobster Bay to include all the islands not included in District No. 15, as far South as Bramble Island to the West of Jones Island;

THENCE Northwardly through the Grand Passage to the Eel Brook Bridge;

THENCE in a Southeasterly, Easterly and Northerly direction following the several courses of the Westerly and Southerly shores of Eel Lake to a point where the said shore meets N.S. Highway No. 103;

THENCE in a Northerly direction along the Western boundary of Highway 103 to Herring Brook (so-called);

THENCE in a Northerly direction following the various courses of Herring Brook (so-called) to Pothier's Mill Pond;

THENCE running Northeastwardly along the John Allen Grant North line to the Northern end of West Clear Water Lake and the French line, so-called;

THENCE Eastwardly along said French line to the termination thereof;

THENCE Southeastwardly to the Shelburne County line;

THENCE Southwestwardly along the said Shelburne County line to District No. 18;

THENCE running Westwardly and Southwardly along District No. 18 to the C.N.R. Railway right-of-way;

THENCE Southeasterly along the C.N.R. Railway right-of-way to the Greenwood Road;

THENCE Southwesterly along the Greenwood Road to N.S. Route No. 3;

THENCE Southwesterly in a straight line to a point 1000 feet Westwardly from the intersection of the Argyle Sound Cross Road with N.S. Route No. 335;

THENCE Westerly along the Argyle Sound Cross Road to the shore of Lobster Bay and the place of beginning.

DISTRICT NO. 18 ONE COUNCILLOR

Pubnico, East Pubnico and Lower East Pubnico

BEGINNING at the point at Argyle Sound where the Argyle Sound Cross Road strikes the shore of Lobster Bay;

THENCE running in an Easterly direction along the middle of said Argyle Sound Cross Road to a point 1000 feet Westerly from the intersection of the Argyle Sound Cross Road with N.S. Route No. 335;

THENCE Northeasterly in a straight line to the intersection of N.S. Route No. 3 with the Greenwood Road;

THENCE along the Greenwood Road to the C.N.R. Railway right-of-way;

THENCE in a Northwesterly direction along the C.N.R. Railway right-of-way to the South line of lands formerly of John Spinney;

THENCE to run back Easterly the course of that line to the Shelburne County line;

THENCE running Southwardly and Westwardly along said Shelburne County line to the Pubnico Harbour;

THENCE running Northwardly and Westwardly along the shore of Pubnico Harbour to the North line of formerly Anselm d'Eon's land now of Leon d'Eon's land;

THENCE running Westwardly along said line of Leon d'Eon's North line to the Lobster Bay;

THENCE running Northwardly along the shore of said Lobster Bay to where the Argyle Sound Cross Road strikes the said Lobster Bay and the place of beginning.

DISTRICT NO. 20 & 20A **ONE COUNCILLOR**

East Kemptville, Portion of North Kemptville, Tusket, A Portion of Pleasant Lake and Gavelton

(20) BEGINNING at the old site of Moody's Mill on the Tusket river;

THENCE running along the several courses of the Tusket River until it comes to the Eastern line of the Municipality of Yarmouth where that line strikes the Little Branch near what was formerly Nathaniel Churchill's and Cunard's Sawmill;

THENCE running North 21 Degrees West by the line aforesaid to the Northeast angle of the Municipality of Yarmouth and Digby County line;

THENCE running Eastwardly along the said Digby County line to the Shelburne County line;

THENCE running Southwestwardly by said Shelburne County line to District No. 16 line;

THENCE running Westwardly along said District No. 16 line to the said old site of Moody's Mill on the Tusket River and the place of beginning.

(20A)

BEGINNING at a point on the Eastern shore of the Tusket River where the South line of Arthur Marster's strikes said River;

THENCE running in a Westerly direction across said River to the North line of formerly William Bullowell's land;

THENCE running Northwestwardly along said North line of formerly William Bullowell's land to the Burnett line;

THENCE running in a Northeastwardly direction and Eastwardly direction along said Burnett line to the Tusket River;

THENCE running Northwardly along the several courses of the Tusket River to a point 300 feet Eastwardly from the Gavelton Bridge;

THENCE Southwardly along a line parallel to and 300 feet from the Gavelton's Road to the Back Road leading from the Main Quinan Road to the Gavelton Road;

THENCE Southwardly along the said Back Road to the C.N.R. Railway right-of-way;

THENCE along the C.N.R. Railway right-of-way in a Southwesterly direction to a point on the Tusket-Gavelton Base Line;

THENCE in a Southeasterly direction along the Tusket-Gavelton Base Line to a brook;

THENCE in a Southerly direction along the aforementioned brook to the Abram's River;

THENCE in a Southeasterly direction along the Abram's River to the prolongation of the Westerly boundary of lands of Raymond LeBlanc;

THENCE in a Southwesterly direction along the prolongation of and the Western boundary of lands of Raymond LeBlanc to N.S. Route No. 3; said point being 1744 feet from the intersection of the Abram's River Road with N.S. Route No. 3;

THENCE running Westwardly along N.S. Route No. 3 to the John Breynton's Grant West Base Line;

THENCE Southerly along said Base Line to a point;

THENCE Westwardly along the prolongation of Lester Muise's South line to the Main Post Road (said point being 575 feet Southerly from the intersection of the Doucet Hill Back Road with the Main Post Road);

THENCE following the South line of Horatio Wood, Wilbur Wood and Arthur Marster's land in a Westerly direction to the place of beginning.

The Board confirms the existing metes and bounds descriptions for Districts 14, 19, and 21 and confirms that one Councillor shall represent each of the eight municipal polling districts.

An order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of August, A.D., 1985.

RHBlois

R.H. BLOIS

Chairman, NOVA SCOTIA
MUNICIPAL BOARD.

Re Town of Stellarton

MUNICIPAL REPRESENTATION--WARD BOUNDARIES--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 14--MUNICIPAL BOARD ACT, S. 25(1), 27

This is an application by the Town of Stellarton to amend its ward boundaries. The Town Clerk-Treasurer and a Nova Scotia Land Surveyor gave evidence on behalf of the Town. No other persons attended the hearing.

HELD: The ward boundaries of the Town should be amended as requested.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, Ch. 195, R.S.N.S. 1967;

- and -

IN THE MATTER OF: An Application by the **TOWN OF STELLARTON** for an order amending the ward boundaries within the Town.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman.

COUNSEL: JOHN B. BAKER, Q.C., for the Town.

DECISION

A hearing was held by the Board in the Committee Room of the Town Hall, Stellarton, on June 24, 1985, on an application by the **TOWN OF STELLARTON** to amend its ward boundaries. The original application (Petition) to the Board dated February 6, 1985, and received by the Board February 12, 1985, was filed as Exhibit S-1. At the request of the Board an Amended Application (Petition) was submitted by the Town dated March 11, 1985, and received March 19, 1985, which was filed as Exhibit S-2.

The Board having satisfied itself that the public hearing had been duly advertised on June 3rd, 10th and 17th, 1985, in the Evening News as required by Section 25(1) of the Municipal Board Act, Ch. 9, S.N.S., 1981, and that the Minister had been notified as required by Section 27 of that Act, proceeded to hear the merits of the application.

The application was made pursuant to Section 14(1)(c) of the Municipal Boundaries and Representation Act. Section 14 of the Act reads as follows:

> (1) Notwithstanding the provisions of any general or special Act, upon the application of the Minister or a municipality authorized by a resolution of the Council thereof, or of one hundrd [hundred] ratepayers of a city or town or fifty ratepayers of a municipality other than a city or town, the Board by order may
>
> a) divide or redivide a city or incorporated town into wards in the manner provided in Section 13;
>
> b) divide or redivide a municipality, other than a city or incorporated town, into polling districts;
>
> c) amend the boundaries of any ward or polling district;
>
> c)(a) dissolve the wards or polling districts of a municipality;
>
> d) determine the number of aldermen or councillors for each ward or polling district; and
>
> e) determine the date upon which the division, redivision, amendment or determination shall take effect.
>
> (2) In settling and determining the number and boundaries of wards and polling districts and the number of aldermen or councillors for each ward or polling district, the Board shall give consideration inter alia to population density."

The application (Exhibit S-2) by the Town, entitled a petition, signed by the Mayor, Ronald S. Marks, and the Clerk-Treasurer, A.A. Pearson, states:

"1. THAT by resolution of a regular

meeting of the Town Council of the Town of Stellarton held on the 11th day of March, A.D., 1985, the said Town Council duly passed a resolution with referce to a change in the Ward I and Ward II boundaries, the boundaries of Ward III remaining unchanged, of the Town of Stellarton and that attached hereto and marked Exhibit "A" is a true copy of the said resolution duly certified by the Clerk-Treasurer of the Town of Stellarton.

2. THAT attached hereto and marked Exhibit "B" is a map showing the present ward boundaries of the Town of Stellarton and attached to the said map are the legal descriptions of the boundaries of the said wards as determined in November 1889 at the time of incorporation of the said town and the number of eligible voters for each ward as prepared by the Registrar of Voters for the Town of Stellarton.

3. THAT attached hereto and marked Exhibit "C" is a map showing the Ward boundaries as proposed by the Town of Stellarton and attached to the said map are the legal descriptions of the boundaries of the said wards and the number of eligible voters for each proposed ward as prepared by the said Registrar of Voters.

4. THAT the present number of Councillors elected from Wards 1, 2 and 3 at present, are two from each ward, and that it is proposed that the number remain the same from each ward should the proposed ward boundary changes be made.

5. THAT your petitioners hereby respectfully request that the Municipal Board of the Province of Nova Scotia give consideration to and order that the ward boundaries of Ward I and Ward II be changed, the boundaries of Ward III remaining the same, in accordance with the hereinbefore request contained in the Petition."

The resolution of Council which accompanied the application as Exhibit "A" was filed as Exhibit S-3. It states:

> "BE IT RESOLVED that the boundaries between Ward I and Ward II in the Town of Stellarton be changed from its present location of extending along Acadia Avenue in a Easterly direction to the East River to a line extending from Acadia Avenue along the Canadian National Railways tracks to there intersection with River Street and George Street and thence along the centre line of George Street to the East River and more fully set out in Plan of J. Albert MacCallum showing proposed ward boundaries for the Town of Stellarton. That the boundaries for Ward III in the Town of Stellarton remain unchanged.
>
> BE IT ALSO RESOLVED that the Town-Clerk have the necessary Plans and Petition prepared for Change of Ward boundaries as provided by Chapter 195 of the Revised Statutes of Nova Scotia, R.S.N.S. 1967 and forwarded to the Municipal Board of the Province of Nova Scotia."

The Town Clerk-Treasurer, Adrian Pearson, and J. Albert MacCallum, a Nova Scotia Land Surveyor, gave evidence. No other persons attended the hearing.

Mr. Pearson who is both the Town Clerk-Treasurer and the Returning Officer pursuant to the Municipal Elections Act, stated that the present boundaries of the three wards of the Town appear to date from a resolution passed by the Town Council on September 11, 1921. A copy of the handwritten Council Minutes containing this resolution was filed as Exhibit S-6. Mr. Pearson commented that the boundaries established by resolution of Council in 1921 are not referred to in the Minutes as representing any change.

Currently two Councillors are elected for each of the three existing wards; Mr. Pearson explained that Council wished this arrangement to continue. A very slight change is desired to the southern boundary of Ward 3, the most northerly of the three wards. The change requested by the Town to the boundary between the central ward, Ward 2 and the most southerly ward, Ward 1, would better equalize the voter population in each ward.

Mr. Pearson gave the number of voters in each ward according to the 1982 municipal electoral list as follows:

WARD I	-	1482
WARD 2	-	855
WARD 3	-	1159

The changes to ward boundaries proposed by the Town would result in approximately 1200 voters in each ward. Mr. pearson's projections for the voter population in 1985, in each of the proposed wards are as follows:

WARD 1	-	1164
WARD 2	-	1203
WARD 3	-	1200

The alteration in the southern town boundary resulting from a decision of this Board issued June 14, 1985, determining boundaries of the Municipality of the County of Pictou, would remove six voters from Ward 3 of the Town according to Mr. Pearson.

Mr. Albert MacCallum, a Nova Scotia Land Surveyor since 1966 and a resident of the Town, commented on the descriptions of existing ward boundaries in the town and a plan showing existing ward boundaries (filed as Exhibit S-4) and on descriptions of proposed ward boundaries and a plan showing proposed ward boundaries (filed as Exhibit S-5). Both descriptions and plans were prepared by Mr. MacCallum who used the LRIS street plan of the Town to which he added further information.

Mr. MacCallum pointed out that the eastern (East River) boundary and the western (Bear Brook) boundary of Ward I would remain the same in the proposed ward boundaries. The southern boundary of Ward 1 which is the northern boundary of the Municipality of the County of Pictou between the East River and Bear Brook, would be altered by the aforementioned decision of this Board. The northern boundary of Ward 1, which is the southern boundary of Ward 2, would remain the same in the west, beginning at Bear Brook and following the centre line of Acadia Avenue. At the intersection of Acadia Avenue and the Canadian National Railway Line, Pictou Branch, the proposed ward boundary would veer south-easterly, following that railway line to its intersection with the Canadian National Railway branch line to the Hopewell Subdivision, then following that line in turn to the centre line of George Street and following the centre line of George Street to the west bank of the East River of Pictou.

A slight alteration is proposed for the northern boundary of Ward 2, which is the southern boundary of Ward

3. Mr. MacCallum explained that this was an adjustment at the westerly end of the boundary between Wards 2 and 3 commencing at the intersection of the Albion Mines Road and MacGregor Avenue. From that point westerly it is proposed that the boundary be moved to the south a distance of 125 feet from, and parallel to, Water Street and its westerly prolongation to Bear Brook.

The Board notes that although the application by the Town (Exhibit S-2) and the Resolution of Town Council authorizing the application (Exhibit S-3) state that the boundaries of Ward 3 are to remain unchanged, both the descriptions and the plan of proposed ward boundaries (Exhibit S-5) record the slight alteration at the western end of the common boundary between Wards 2 and 3 which is described above.

The plans drawn by Mr. MacCallum and dated February 25, 1985, showing the existing ward boundaries of the Town of Stellarton (Exhibit S-4) and the proposed ward boundaries of the Town (Exhibit S-5) do not show the southern boundary of the town as revised by the decision of the Board of June 14, 1985. At the request of the Board and subsequent to the hearing, the town submitted revised plans dated June 28, 1985, showing the revised southern town boundary.

Considering the evidence adduced by the Town in the light of Section 14(2) of the Municipal Boundaries and Representation Act, the Board determines that the ward boundaries of the Town of Stellarton should be amended as described in Exhibit S-5 and as shown on the plan prepared by J. Albert MacCallum dated June 28, 1985. The amended ward boundaries are effective August 19, 1985.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of August, A.D., 1985.

Lawrence

ELIZABETH LAWRENCE,
Vice-Chairman

NOVA SCOTIA MUNICIPAL BOARD

Re Town of Yarmouth

MUNICIPAL REPRESENTATION--WARD BOUNDARIES--DISSOLUTION--REVERSION TO COUNCILLORS AT LARGE--EXPEDIENCY--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, SS.8, 14(1)(ca)

This is an application by the Town of Yarmouth to dissolve the three ward boundaries within the Town and to revert to the election of six Councillors at large. The election of six Councillors at large had been the system of municipal representation in the Town from its incorporation in 1890 until 1975. The Town requested the Board to divide the Town into polling districts, but the Board has no authority to do this. No one opposed the application.

HELD: The application is granted and the ward boundaries dissolved.

The Board is satisfied that the Town has valid reasons for the application. The ward system did not achieve the objectives hoped for in 1975. Section 8 of the Municipal Boundaries and Representation Act sets out factors to be considered by the Board. Financial factors are not relevant here. The Board accepts that the dissolution would be expedient.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, R.S.N.S. 1967, Ch.195, as amended;

- and -

IN THE MATTER OF: An application by the Town of Yarmouth to dissolve Ward Boundaries within the Town of Yarmouth.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: Gregory M. Warner, LL.B., for the Town of Yarmouth.

DECISION

A hearing was held after due public notice in the Council Chambers of the Town of Yarmouth on August 29, 1985, on an application by the Town pursuant to Section 14(1)(ca) of the Municipal Boundaries and Representation Act, R.S.N.S. 1967, Ch.195, to dissolve the ward boundaries within the Town. The application by the Town (Exhibit Y-1) was dated July 18, 1985, and received by the Board July 23, 1985.

The application was accompanied by a copy of the resolution of the Town Council, (Exhibit "A" to the application) passed at a meeting of Council on July 11, 1985, and certified by the Town Clerk, Katheryn J. Moses, on July 18, 1985. The resolution of Council states:

> " That an application be made to the Municipal Board for the dissolution of the three wards in the Town of Yarmouth, each ward represented by two Councillors, and the reversion to the system whereby six Councillors are elected at large by all electors, in the manner provided under Section 14 of the Municipal Boundaries and Representation Act, Chapter 195 of the Revised Statutes of Nova Scotia, 1967."

The application by the Town, signed and sealed by the Mayor, Marjorie E. McEachern, and the Town Clerk-Treasurer Katheryn J. Moses, reads as follows:

> "1. THAT by resolution of the regular meeting of the Council of the Town of Yarmouth held on the 11th day of July, 1985, the said Town Council duly passed a resolution to dissolve the wards and revert to polling districts in accordance with Section 14 of the Municipal Boundaries and Representation Act. A true copy of the said resolution duly certified by the Town Clerk and Treasurer is attached hereto as Exhibit "A".
>
> 2. THAT the said vote by the Councillors upon the resolution was as follows:

	Record of Council Vote	
	Aye	Nay
Mayor Marjorie McEachern	x	
Deputy Mayor Willard Allen	x	
Councillor Charles Crosby	x	
Councillor Victor Eldridge		x
Councillor Clifford Hood	x	
Councillor Gerald Purkis	x	
Councillor Douglas Surette	x	

> 3. THAT the said Town Council requests that the boundaries of the said town be redivided into polling districts which elect six (6) Councillors and one Mayor at large in accordance with the Towns Act, being Chapter 309, of the Revised Statutes of Nova Scotia, 1967, and the Three (3) Wards be dissolved.
>
> 4. THAT attached hereto and marked Exhibit "B" is a map of the Town showing the three Wards and the six proposed polling districts. Also marked on the said map are the numbers of voters for each Ward as shown on the last list of voters prepared by the Town.

> 5. THAT attached hereto and marked Exhibit "C" are descriptions of the proposed revised polling districts.
>
> 6. THAT attached hereto and marked Exhibit "D" are descriptions of the present Wards.
>
> 7. THAT attached hereto and marked Exhibit "E" is a list of the committees, boards and commissions of the Town Council,or on which the said Town Council has representation, a summary of the duties and responsibilities of each committee, board or commission, and a schedule showing the number of meetings held by each such committee, board and commission during 1984.
>
> 8. THAT your Petitioner hereby respectfully requests that the Municipal Board of the Province of Nova Scotia give consideration to and do order that Ward System of the said Town be dissolved and the reversion to Electoral Districts be in accordance with the request contained in the Petition and exhibits attached hereto and order that the said boundaries and wards and designations thereof be so changed."

It was agreed that the only matter before the Board was an application for the dissolution of the three wards of the Town with two Councillors elected from each and the reversion to the election of six Councillors at large, as stated in the authorizing resolution of Council. The Board has no authority to redivide the Town into polling districts as requested in the application.

Counsel for the Town called one witness. The Mayor, two members of Council and a member of the Yarmouth District School Board also gave evidence. No one opposed the application.

Miss Katheryn Moses is the Clerk-Treasurer of the Town, which has been her employer since 1965. She outlined the reasons why the Town Council had applied to have the Town divided into wards in 1975 and how the Town's expectations for the ward system had been realized since then.

Prior to the Order of the Board of Commissioners of Public Utilities of May 20, 1975, which divided the Town into wards, Yarmouth had elected six Councillors at large since 1890 when the Town was incorporated. The current population of the Town is approximately 8,000 according to Miss Moses.

In making the application to have the Town divided into wards, Miss Moses explained that the Council in 1975 had felt that the frequent situation of areas of the Town being represented by a Councillor who did not live in or near that area would be remedied if the ward system replaced town-wide elections. Also it was felt that the ward system would result in a closer relationship between the elected members of Council and the individual citizens, and would therefore result in better numbers of candidates offering for election.

However, Miss Moses stated that currently only 2 out of the total of 6 Councillors reside in the wards which they represent and that items of interest to a particular ward of the town are often brought to Council's attention by a Councillor representing another ward.

Miss Moses said that in the last municipal election, there had been an election for only one ward - the Councillors for two of the Town's wards had been elected by acclamation.

The Clerk-Treasurer pointed out that in 1980, five years after the ward system had been instituted, the Council had formally asked to have it dissolved. At that time, the Board of Commissioners of Public Utilities had responded to the Town's request with the information that the Municipal

Boundaries and Representation Act gave it no jurisdiction to hear such an application. In 1981 the Act was amended to allow the dissolution of wards.

Mayor Marjorie McEachern has been on Council since 1976 and stated that she believed that the ward system was "not significant" to the citizens of the town, and that the town was too small for wards to be effective. In her opinion, citizens did not distinguish Councillors by the ward which they represented and the members of Council felt that they worked for the benefit of the whole town rather than a section of it.

Councillor Clifford Hood, a former municipal solicitor for the Town and a candidate for Mayor in 1979, believed that the ward system had not achieved the objectives anticipated. He had been municipal solicitor when the Town applied to have the Town divided into wards. Councillor Hood believed that there would more likely be elections for Council if Councillors were elected at large rather than by wards and for this reason primarily he supported the application to the Board.

Malcolm Bradshaw, an elected member of the Yarmouth District School Board since 1982, spoke in favour of the dissolution of the ward system. The Yarmouth District School Board is composed of 12 members equally divided between the Town of Yarmouth and the Municipality of the District of Yarmouth. Of the Town representatives, two are directly elected at large, two are appointees of Town Council (Councillors), and two are provincial appointees.

He observed that the three elementary schools in the Town are each located in a separate ward. He felt that any cutbacks in educational services or re-allocation of school functions would most probably be opposed by the Town Council appointees to the Board who are two of the six Councillors, particularly if proposed changes affected the school located in the ward they represented. Whereas he and his fellow elected Board Member were elected at large to represent the Town, Mr. Bradshaw felt that individual ward considerations were more likely to be a principal concern to the two Town Councillors on the School Board.

Deputy Mayor Willard Allen, whose experience on Town Council dates back to 1954, favoured the abolition of the ward boundaries and was confident that the general opinion of the residents of the Town supported Council's application to the Board. He filed as an exhibit an editorial printed in the local weekly newspaper, the Vanguard, on July 16, 1985, supporting this view.

From the evidence adduced and the opinions expressed at the hearing, the Board is satisfied that the Town of Yarmouth which has been divided into three wards since 1975, has valid reasons for the application for the dissolution of its ward system which did not achieve the objectives hoped for in 1975.

Section 8 of the Municipal Boundaries and Representation Act sets out the factors to be considered by the Board as follows:

> " Upon an application to the Board, the Board shall inquire into and take into account the necessity or expendiency [expediency] of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

In this application financial factors are irrelevant. While the Town did not argue that its application was a matter of necessity, the Board accepts its arguments as convincing that an Order dissolving the ward boundaries in the Town would be expedient.

The Board accordingly will issue an Order dissolving the ward boundaries in the Town of Yarmouth, effective September 12, 1985.

DATED at HALIFAX, Nova Scotia, this 12th day of September, A.D., 1985.

EHLawrence

ELIZABETH LAWRENCE
Vice-Chairman

Re County of Halifax

MUNICIPAL REPRESENTATION--BOUNDARIES OF DISTRICTS--NUMBER OF VOTERS IN EACH DISTRICT--EXPEDIENCY--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, SS. 8, 14(1)(c),(2), 15

This is an application by the Municipality of the County of Halifax to amend the boundaries of Districts 7 and 21. Evidence was given on behalf of the Municipality. No member of the public attended the hearing and the affidavits filed expressed no objection.

HELD: The Board approves the application as requested.

Although section 14(2) of the Municipal Boundaries and Representation Act states that the Board shall give consideration to population density, in this application the issue of population density is not the principal factor to be considered. While there appears to be an imbalance in the number of voters between Districts 7 and 21, the numbers of enumerated voters in the subject area would not significantly affect the total in either district. With respect to the factors listed in s.8, the financial factors are irrelevant here. The municipality did not argue necessity but expediency is clearly relevant. The subject area has been treated and regarded as part of District 7 and the Municipality had intended in a previous application to the Public Utilities Board to establish the boundaries as proposed here.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, R.S.N.S. 1967, c.195, as amended;

- and -

IN THE MATTER OF: An application by the Municipality of the County of Halifax to amend the boundaries of Districts 7 and 21 in the Municipality.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: ROBERT G. CRAGG, LL.B., and LYNN M. HENRY, LL.B., for the Municipality

DECISION

A hearing was held after due public notice in the Board Room of the Municipal Board at Suite 510, 1809 Barrington Street, Halifax, on August 2, 1985, on an application by the Municipality of the County of Halifax pursuant to Section 14(1)(c) of the Municipal Boundaries and Representation Act, to amend the boundaries of Districts 7 and 21 in the Municipality. The application (Exhibit H-1) dated June 24, 1985, was received by the Board on the same day. At the request of the Board, the Municipality filed a new application (Exhibit H-2), dated July 2, 1985, which was received by the Board July 3, 1985.

The application reads as follows:

"The Municipality of the County of Halifax, as authorized by Resolution of the Council thereof, and pursuant to the provisions of Section 14 of the Municipal Boundaries and Representation Act, being Chapter 195 of the Revised Statutes of Nova Scotia, 1967, as amended, does hereby apply to the Nova Scotia Municipal Board as follows:

1. By Order of the Board of Commissioners of Public Utilities dated the 16th day of December, 1981, the boundaries of Districts 7 and 21 of the Municipality of the County of Halifax were approved. Attached hereto as Schedule "A" is a description of the present boundaries of District 7. Attached hereto as Schedule "B" is a description of the present boundaries of District 21;

2. County Council has determined that a more equitable and representative division of Districts 7 and 21 could be effected as hereinafter set forth. Attached hereto as Schedule "C" is a true copy of the Resolution of the Council of the Municipality of the County of Halifax, adopted on the 18th day of June, 1985, whereby the Council for the Municipality of the County of Halifax requests that an application be made to the Board seeking to amend the boundaries of District 7 and 21;

3. Attached hereto as Schedule "D" is a description of the proposed boundaries of District 7;

4. Attached hereto as Schedule "E" is a description of the proposed boundaries of District 21;

5. The change proposed in the boundaries of Districts 7 and 21 will be seen by a comparison of Schedules "A", "B", "D" and "E". Such comparison indicates the following change:

   (a) the inclusion of a portion of District 21, in particular lots fronting on Pioneer Court and Cedarwood Drive, within District 7;

6. The number of voters that appear on the voters' list for the present District 7 is 2511;

7. The number of voters that would appear on the voters' list for the proposed District 7 is 2634;

8. The number of voters that appear on the voters' list for the present District 21 is 4767;

9. The number of voters that would appear on the voters' list for the proposed District 21 is 4644;

10. Attached hereto as Schedule "F" is a map outlining the present boundaries between District 7 and District 21 with respect to the area in question;

11. Attached hereto as Schedule "G" is a map outlining the proposed boundary between District 7 and District 21 with respect to the area in question;

12. The purpose for this Application is to ensure that the boundary line between District 7 and 21 with respect to the area in question accords with and reflects both the public's and the Municipality's perception of same. At the time of the application to the Board of Commissioners of Public Utilities, which resulted in the Order referred to in Paragraph 1 hereof, it was the intention of County Council to establish the boundary between Districts 7 and 21 with respect to the area in question along the line proposed in this Petition. However, due to a misdescription in the said 1981 application to the Board of Commissioners of Public Utilities, the present boundary line with respect to the area in question was approved and established instead, which includes the area in question within District 21. Since the Order of the Board of Commissioners of Public Utilities, as referred to in Paragraph 1 hereof, the area in question has been treated and regarded as part of District 7 by the local residents, the Councillors for Districts 7 and 21, and the Municipality of the County of Halifax;

13. Application is hereby made for the aforesaid amendment of the boundaries of Districts 7 and 21 to be effective the 31st day of July, 1985, or such other date as the Board may in its discretion decide;".

Counsel for the Municipality called the Warden, the Director of Planning and Development and the Clerk-Treasurer to give evidence. No member of the public attended the hearing.

Three Affidavits were filed with the Board, all expressing non-objection to the Municipality's application.

The Affidavit of Ronald Cooper of Cole Harbour, Secretary to the Westphal, Cole Harbour and Area Service Commission, dated July 30, 1985, and filed as Exhibit H-6 states:

> "That the Westphal, Cole Harbour and Area Service Commission have no objections to the proposed amendment to the boundaries of District 7 and 21."

The Affidavit of Raymond J. DeRoche of Westphal, Councillor for District 7 in the Municipality, dated July 19, 1985 and filed as Exhibit H-8 states:

> "That to the best of my knowledge and belief the portion of District 21 sought to be included within the boundaries of District 7 has always been regarded and treated as part of District 7 by the local resident[s] and by officials of the Municipality of the County of Halifax."

Councillor DeRoche expressed no objection to the proposed amendments to the District boundaries.

The Affidavit of Stephen K. Mont of Cole Harbour, Councillor for District 21 in the Municipality, dated July 2, 1985, (Exhibit H-9) makes the same statement as the Affidavit of Councillor DeRoche.

Arthur MacKenzie, Warden of the Municipality and Councillor for District 11, verified that the copy of the motion of Council authorizing this application which appears as Schedule "C" to the application (Exhibit H-2) was passed unanimously by Council at its June 18, 1985 session.

Mr. Keith Birch, Director of Planning and Development in the Municipality for the past five years explained the current and proposed district boundaries with reference to two large extracts from the zoning map of the municipality showing Districts 7, 21 and 17. The current district boundaries are represented on the map filed as Exhibit H-3; the proposed district boundaries are represented on the map filed as Exhibit H-4.

The area proposed to be removed from District 21 and added to District 7 was described by Mr. Birch as bounded on the north by Highway Number 7, on the east by Forest Hills Parkway, on the south by the southern boundary of Parcel MF8-2 of the Nova Scotia Housing Commission Forest Hills Land Assembly and its extension easterly and westerly, and on the west by the City of Dartmouth boundary. Mr. Birch explained that the subject area contains some residential properties fronting on Highway 7 but that the bulk of the area has been residentially developed by the Cranberry Co-op whose internal streets are Pioneer Court and Cedarwood Drive. A portion of the western part of the area bordering on Cranberry Lake is zoned P-1 (open space). The residential lands belonging to the Cranberry Co-op are fully developed according to Mr. Birch. He estimated that approximately 180 people live in the subject area.

Mr. Gerald J. Kelly, Clerk of the Municipality for approximately five years and Returning Officer for the Municipality pursuant to the Municipal Elections Act, gave evidence on the events leading up to the hearing of this application. Mr. Kelly had been involved in an application before the Board of Commissioners of Public Utilities heard on November 5, 1981, which resulted in changes to District boundaries in the Municipality, and in the establishment of the district boundaries bordering on the subject area. In his capacity as Returning Officer, Mr. Kelly became aware, during preparations for the municipal election to be held in October of this year, that the subject area was considered by the residents and the abutting Councillors to be part of District 7, although the metes and bounds descriptions contained in Schedule "A" of the Order of the Board of Commissioners of Public Utilities dated January 20, 1982, included the subject area in District 21. Mr. Kelly stated that the application to this Board is based upon the preferences of both the residents of the subject area and the Councillors for District 7 and District 21, as well as on the (incorrect) assumption by both Councillors and residents during the previous three years that the area was a part of District 7 and not of District 21. According to Mr. Kelly, there are 123 voters enumerated in the subject area for the 1985 municipal elections. To the Clerk's knowledge, there had been no opposition expressed, either written or verbal, to the application.

Mr. Kelly verified the signatures on the Affidavits of Mr. Cooper, Councillor DeRoche and Councillor Mont.

Section 14(2) of the Municipal Boundaries and Representation Act states:

> " In settling and determining the number and boundaries of wards and polling districts and the number of aldermen or councillors for each ward or polling district, the Board shall give consideration inter alia to population density."

In the opinion of the Board the issue of population density is not the principal factor to be considered in this application. The application (Exhibit H-2) states that at present the number of electors on the voters list for District 7 is 2511 and the number of electors on the voters list for District 21 is 4767. While there appears to be an imbalance in the numbers of voters between these two districts, the 123 enumerated voters in the subject area would not significantly affect the total of either district. Undoubtedly the discrepancy in (voter) population density between Districts 7 and 21 will be addressed when the Municipality studies its polling districts pursuant to Section 15 of the Act in 1987.

Section 8 of the Municipal Boundaries and Representation Act lists factors to be considered by the Board when considering an application as follows:

> Upon an application to the Board, the Board shall inquire into and take into account the necessity or expendiency [expediency] of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

In the opinion of the Board the financial factors are irrelevant in this application. The municipality did not argue necessity but expediency is clearly a relevant factor to be taken into account in this application.

The Board accepts the evidence adduced at the hearing that the subject area has been treated and regarded as part of District 7 by the local residents, the Councillors for Districts 7 and 21, and the Municipality of the County of Halifax, and that the Municipality had intended in its 1981 application to the Board of Commissioners of Public Utilities to establish the boundary between Districts 7 and 21, as is proposed in the application before this Board.

The Board therefore approves the application of the Municipality of the County of Halifax to amend the boundary of Districts 7 and 21 to include a portion of District 21 within District 7, as set out in Schedules "D" and "E" of the Municipality's application, to take effect September 27, 1985.

An Order will issue accordingly.

DATED at HALIFAX, NOva Scotia this 27th day of September, A.D., 1985.

EA Lawrence

ELIZABETH A. LAWRENCE
Vice-Chairman

Skidmore et al v. Village of Kingston

VILLAGE SERVICE--APPLICATION TO REMOVE AREA FROM VILLAGE--BEST INTERESTS OF THE INHABITANTS OF THE AREA--WHETHER "AREA" IS ALL OF VILLAGE OR ONLY AREA APPLYING TO BE REMOVED-VILLAGE SERVICE ACT, SS. 3(2), 12(1), 13A(1), 14, 14A

This is an application by owners of real property to remove from the Village of Kingston an area including Brookside Drive and Pinegrove Crescent in the District of Wilmot, Annapolis County.

HELD: The application is granted and an order will issue removing the subject area from the Village of Kingston.

The issue before the Board is whether the removal of the area proposed to be taken from the Village is "in the best interests of the inhabitants of the area" in accordance with s.14A(1) of the Village Service Act. An important question in making this determination is what area is meant in the phrase "the inhabitants of the area," i.e. whether the best interests of the inhabitants of the Village of Kingston are to be considered or the best interests of just the inhabitants of the area proposed to be taken from the Village. Under the Municipal Boundaries and Representation Act various factors to be considered before altering municipal boundaries are set out and the Board is very specifically directed to consider a number of issues in relation to all ratepayers who will be affected by the Board's decision. While an anomaly exists between the factors to be considered in determining alterations to boundaries of all other municipal units in the Province except villages, the Board cannot transpose the directions in the Municipal Boundaries and Representation Act to an application under the Village Service Act just because the matter to be determined is the alteration of the boundary of a municipal unit. Here the Municipality of the County of Annapolis is willing and able to supply a level of municipal services comparable to that now received by the inhabitants of the Brookside Drive/Pinegrove Crescent area. Potential confusion over municipal jurisdiction of the subject area would be eliminated and the inhabitants of the area would be freed from additional taxation by the Village. Many inhabitants of this area also expressed more affinity to Annapolis County than to the Village of Kingston or to Kings County. It is in the best interest of the inhabitants of the Brookside Drive/Pinegrove Crescent area that an order be issued to remove that area from the Village.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Village Service Act, Chapter 329, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Application by ALLAN E. SKIDMORE and other ratepayers of the Village of Kingston to remove from the Village an area known as Brookside Drive and Pinegrove Crescent in the District of Wilmot, Annapolis County.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: ALLAN E. SKIDMORE, Without Counsel for the Applicants;

GORDON A. TIDMAN, Q.C., for the Village of Kingston;

W. BRUCE GILLIS, LL.B., for the Municipality of the County of Annapolis.

DECISION

A hearing was held by the Board on Septebmer 25, 1984, in the Firehall, Kingston, Nova Scotia, on the application of Allan E. Skidmore, an owner of real property in the subject area, made pursuant to Section 14(1)(b) of The Village Service Act to remove from the Village of Kingston an area including Brookside Drive and Pinegrove Crescent in the District of Wilmot, Annapolis County. Mr. Skidmore submitted two applications; the first dated June 26, 1984 was received by the Board June 28, 1984. At the request of the Board the Applicant submitted a new application dated August 22, 1984 containing updated and additional information. Pursuant to Section 14(3) of the

Village Service Act, the application (Exhibit K-1) was accompanied by a petition (Exhibit K-1(a)) signed by real property owners of the area proposed to be taken from the Village. The heading on the petition reads as follows:

> "In accordance with Section 14(3) of Chapter 41, Acts of 1984 of the Village Services Act, the following real property owners of Brookside Drive and Pine Grove Crescent, District of Wilmot, Annapolis County, which represents more than two-thirds of real property owners in the area mentioned, petition the Municipal Board of Nova Scotia to permit such area to be released from the Village of Kingston boundries."

Together with the petition, Mr. Skidmore submitted a copy of an Annapolis County assessment list of real property owners of Brookside Drive and Pinegrove Crescent with their mailing addresses and identifying property and field card numbers. In addition, Mr. Skidmore submitted a map showing the present boundaries of the Village of Kingston (Exhibit K-1 (c)), a metes and bounds description of the area proposed to be removed from the Village of Kingston (Exhibit K-1(d)) and a copy of the official Annapolis County Planning Department Map of District 1 (Exhibit K-1(e)) showing the area proposed to be removed from the Village.

A Notice of Hearing prepared by the Board and dated August 29, 1984, was published in the Mirror newspaper on September 5th, 12th and 19th and copies of the Notice of Hearing were served on certain people by Mr. Skidmore as directed by the Board.

The area which the applicants proposed should be taken from the Village of Kingston is described in Exhibit K-1(d) as follows:

> "BEGINNING at a point just South of Highway Number One where the East bank of the Walker Brook, so called, is intersected by the County line between Annapolis and Kings County;
>
> THENCE Southerly along the County line to the North Bank of the Annapolis River;
>
> THENCE Westerly along the several courses of the North bank of the Annapolis River to the East Bank of the Walker Brook;
>
> THENCE Northerly along the several courses of the East bank of the Walker Brook to the point of beginning."

The area thus described does not completely encompass Brookside Drive which intersects with Highway No. 1 to the east of the Annapolis County/Kings County line. Beginning on the south side of Highway No. 1 in Kings County, Brookside Drive runs south, crossing the Dominion Atlantic Railway tracks, and then continues in a southwesterly direction for approximately 1,000 metres. Brookside Drive provides the only access from Highway No. 1 to the Paragon Golf and Country Club which lies to the east of the subject area. Approximately 250 metres of Brookside Drive lie in Kings County, the balance lies in Annapolis County. Pinegrove Crescent lies entirely within the Municipality of the County of Annapolis to the north of Brookside Drive at its southwestern extremity.

The area outlined in the metes and bounds description quoted above is the area added to the Village of Kingston by By-law passed by the Village Commission March 30, 1971. This area is the only part of the Village of Kingston which lies outside Kings County.

The signatures of the owners of 39 parcels of real property appear on the petition (Exhibit K-1(a)) submitted by Mr. Skidmore, the Appellant. The Assessment list of real property owners of Brookside Drive and Pinegrove Crescent (Exhibit K-1(b)) contains the names of the owners of 48 properties.

Counsel for the Village of Kingston raised no objection to the Board's jurisdiction to hear this application. The Board assumed jurisdiction and proceeded to hear the application on its merits.

The applicant gave evidence and in addition called six witnesses. Counsel for the Village called two witnesses and Counsel for the Municipality of the County of Annapolis called one.

Mr. Skidmore outlined the events which led to the hearing of this application. The petition of March, 1971, to the Village Commissioners of Kingston which led to the addition of the Brookside Drive and Pinegrove Crescent area to the Village was signed by five persons. Mr. Skidmore alleged that the ratepayers who signed the 1971 petition were not all owners of real property in the area in question and that the petition therefore was invalid because it was signed by less than two-thirds of the owners of real property in the subject area. [This Board does not have the jurisdiction to declare invalid the 1971 petition and therefore assumes for purposes of this application that the 1971 petition and the subsequent decision of the Village Commissioners was valid.] The applicant contended that the majority of the building lots in the area were not purchased until after the 1971 By-law which added the area to the Village was passed, and that most purchasers were not aware that the area had been incorporated into the Village of Kingston until they received their first tax bill.

The applicant stated that a petition requesting that the area be taken from the Village was presented to the Village Commissioners in 1979 or 1980. The Village Commissioners declined to act on the petitioners' request.

In July, 1982, according to Mr. Skidmore, a committee of three ratepayers of the area presented a similar petition to the Council of the Municipality of the County of Annapolis which advised the committee that it had no jurisdiction to consider its request. The Council recommended that the petition be presented to the Village Commissioners and supported the intent of the petition by letter to the Commissioners.

Mr. Skidmore further related that the petition was presented to the Clerk of the Village Commissioners in September, 1982. The Committee of area ratepayers met with the Village Commissioners in April, 1983, after receiving a decision from the Village Commissioners in March 1984, that the Commission was unwilling to reconsider its previous decision and could not support the petition. Amendments to the Village Service Act assented to June 11, 1984, which made it possible for the Board to consider the petition of property owners in the area proposed to be taken from the Village, led to the current hearing Mr. Skidmore stated.

The applicant stated that the reasons why the petitioning owners of real property wished to be separated from the Village of Kingston were the following:

> 1. Many purchasers of property on Brookside Drive and Pinegrove Crescent subsequent to 1971 were unaware that the area had been included in the Village of Kingston.
>
> 2. The petition of 1971 which led to the area being included in the Village was improper.
>
> 3. For the majority of area residents the 1.6 km distance to the Village centre makes them feel that it is "an entirely separate

and apart area". They shop in Middleton or Greenwood rather than in Kingston.

4. Kingston is the only Village in the Province to straddle two counties.

5. Tax rates which differ in Kings County from Annapolis County lead to higher taxes for ratepayers of Brookside Drive and Pinegrove Crescent than for other Kingston ratepayers.

Under cross-examination, Mr. Skidmore stated that a feeling of loyalty to Annapolis County was the most important reason why he and his fellow petitioners were applying to be removed from the Village of Kingston. In order of priority, Mr. Skidmore stated that distance from the Village Centre which lessened the feeling of belonging to the Village for the property owners of Brookside Drive and Pinegrove Crescent was the second most important reason for the application for removal from the Village. The third or fourth most important reason for the petitioners was the increased taxes which they paid.

Nicholas Lasch, a Planner employed by the Municipality of the County of Annapolis for 3½ years, gave evidence for the applicant. Mr. Lasch stated that the Municipality of the County of Annapolis had withdrawn from the Annapolis County District Planning Commission and that it currently did not have a Municipal Planning Strategy or Land-use By-law. The Municipality of the County of Annapolis Planning Advisory Committee anticipated that a plan for District 1 (which includes the subject area) would be forthcoming in the next six months, Mr. Lasch said. District 1 was designated by Council in 1982 to be a test area for a planning process in the Municipality.

The PAC had designated the area of Brookside Drive and Pinegrove Crescent as a residential area, according to Mr. Lasch.

It was established in cross-examination that the original subdivision approval for the Brookside Road/Pinegrove Crescent area was given by the Municipality of the County of Annapolis and any further development approvals would be processed by that Municipality. It was also established that the portion of the Village of Kingston which lies in the Municipality of the County of Kings has a Land-use By-law but that portion of the Village which lies in the Municipality of the County of Annapolis does not and is therefore unzoned.

Mr. Lasch, whose professional qualifications include a degree in Geography and additional planning courses, as well as eleven years working experience in the field, was asked what his personal opinion was, from a professional planning point of view, of the merits of the removal of the Brookside Drive/Pinegrove Crescent area from the Village of Kingston. He responded that the only service which the Village appeared to be offering the subject area was street lighting which could also be provided by the Municipality of the County of Annapolis with the cost being recovered through an area rate. If sewer and water service were needed by the area, Mr. Lasch felt that the Municipality of the County of Annapolis could work out an arrangement with the Village or an individual system could be put in place.

In the matter of services, Mr. Lasch concluded that whether or not the subject area were removed from the Village was "six of one, half-a-dozen of another."

Mr. Lasch stated that an attitude survey carried out by the Municipality of the County of Annapolis in 1982 on approximately 40% of its population contained an open-ended question about "areas of concern". The response from property owners in the subject area indicated "double taxation" was a prevailing concern, Mr. Lasch said.

Commenting on the lack of a Land-use By-law for the subject area, Mr. Lasch was of the opinion that there was less necessity for land use controls in a rural area because infrequent land transfers resulted in comparatively stable land use patterns. The Brookside Drive/Pinegrove Crescent area would, however, be subject to whatever land use controls were developed in the planning process in its preliminary stages in District 1 which includes the subject area.

Mr. Fred Carter, a resident of Melvern Square and Councillor for District 1, Municipality of the County of Annapolis, gave evidence for the applicant. Councillor Carter lives in Melvern Square, a community three miles to the west of the Brookside Drive/Pinegrove Crescent area which he represents. Councillor Carter stated that the nearest sewer services in the Municipality of the County of Annapolis were six or seven miles away in Middleton. The Municipality of the County of Annapolis provides garbage service to the subject area. Fire protection is provided by the Kingston Fire Department which is reimbursed for the service by a grant from the Municipality of the County of Annapolis.

Councillor Carter presented the concerns of the Brookside/Pinegrove Crescent homeowners to the Council of the Municipality of the County of Annapolis on several occasions and supports the efforts of those who have petitioned to be removed from the Village of Kingston.

Mr. George Neilly, an owner of real property on Brookside Drive who, together with his wife, signed the petition requesting removal from the Village, gave evidence on his circulation of the petition to property owners of Brookside Drive and Pinegrove Crescent. He submitted two additional signatures to the petition which were filed as Exhibit K-7. Mr. Neilly stated that he found that most property owners had no hesitation in signing the petition. There was one family who did not wish to sign the petition.

Mr. Neilly felt that sewer and water service from the Village of Kingston (or any other source) was unnecessary since each household had installed a well and septic system at considerable expense. Mr. Neilly believed that some areas of Brookside Drive/ Pinegrove Crescent would need lift stations if central sewer service were installed because of the low elevations of some houses. Mr. Neilly understood that the Village had refused to allow the Paragon Golf Course (Paragon Enterprises Limited) whose lands lie adjacent and to the east of the subject area to connect to the Village sewer system.

Mr. Neilly's personal reasons for supporting an application for separation from the Village of Kingston were that he wanted to live in a rural housing development in Annapolis County and had believed his property to be that when he purchased it; that he believed that there were very few connections between the subject area and the Village because of the physical distance between; that he objected to additional taxation by the Village for minimal direct service; and that he felt administrative control of the area and responsibility for the area would be clarified if it were subject to only one municipal jurisdiction.

Both Mr. Neilly and Councillor Carter filed photo copies of the first page of deeds for two properties in the area proposed to be removed from the Village to prove that some property owners who purchased land in the subject area after it became part of the Village of Kingston were unaware that their properties were in the Village. Exhibit K-4 is a copy of the first page of a Warranty Deed from John V. Stevens to R. Leslie Blaikie and Catherine F. Blaikie dated July 22, 1971, conveying a parcel of land "lying and being at or near Wilmot in the County of Annapolis and Province of Nova Scotia." Exhibit K-6 is a copy of the first page of a Warranty Deed from John V. Stevens to Kenneth George Neilly dated October 20, 1971 conveying parcels of land "lying and being at or near Wilmot in the County of Annapolis and Province of Nova Scotia. The by-law passed March 30, 1971 by the Village Commission adding the subject area to the Village of Kingston was approved by the Minister of Municipal Affairs on April 8, 1971.

Mr. Clarence West, a property owner for twenty years on Brookside Drive, and Vernon Williamson, a property owner for seven years on Pinegrove Crescent, objected to the additional taxation which they must pay to the Village of Kingston. Both Mr. West and Mr. Williamson were signators to the petition for removal from the Village.

Mr. Carl Ryan, a property owner on Pinegrove Crescent since 1976, stated that he had signed the petition in order to lower his taxes and "to find out who I belong to." He felt that identification of the source of services was made more difficult by the overlapping municipal jurisdictions. Mr. Ryan felt that in spite of taxes which are higher in Annapolis County than in Kings County and higher assessment, he preferred to be in Annapolis County. It was his opinion that potential incompatible developments in the subject area, such as an auto body shop, would not be controllable by either the Village or Annapolis County at the present time.

Ronald Grant, Municipal Clerk - Treasurer for the Municipality of the County of Annapolis for three years, verified copies of the Minutes of his Council (Exhibit K-5) submitted by Councillor Carter. Mr. Grant stated that all services provided to other areas of Annapolis County were provided equally to Brookside Drive/Pinegrove Crescent, namely education, fire protection, animal control, Board of Health Services, recreation department services, planning department services including subdivision by-laws and regulations, and garbage collection. Mr. Grant acknowledged that the Kingston Fire Department provided service to parts of Districts 1, 10 and 11 in the County of Annapolis including the subject area, in return for a $10,000.00 annual operating grant from the Municipality of the County of Annapolis. Approximately 30 areas in Annapolis County have street lighting according to Mr. Grant, paid for by an area rate. The County has a dog regulation officer and an unsightly premises Committee, both available to the whole County. The Municipality of the County of Annapolis paid $4,000.00 to upgrade Pinegrove Crescent so that it could be taken over by the Department of Transportation, Mr. Grant stated.

In cross-examination, Mr. Grant was asked if there were any services which the Village could provide to the property owners of Brookside Drive/Pinegrove Crescent which could not be provided by the Municipality of the County of Annapolis. His response was that library service available in Kingston was the only service in that category to his knowledge.

David Reid, a property owner on Brookside Drive, who was a signator to the petition, gave evidence for the Village. As Vice-Principal of the Kingston Elementary School, he stated that students from the subject area go "three ways" to elementary school and to either Middleton or West Kings High Schools. In his opinion, the municipal borders were flexible as far as schooling was concerned. Buses from both Annapolis and Kings County pick up students on Brookside Drive/Pinegrove Crescent he said, with the majority of students going to Kings County.

Mr. Reid stated that he personally did not want to separate from the Village but he felt that the boundary needs to be resolved. His reason for signing the petition to remove the subject area from the Village was not a monetary concern but a desire to end the boundary uncertainty.

Clifton Sabean, Chairman of the Village Commission and a resident of Kingston, gave evidence for the Village. Mr. Sabean has been one of the Village Commissioners of Kingston since 1981 and Chairman for the past 2 years. The Commissioners employ a part-time clerk, a public works employee responsible for grass-cutting, clean-up, maintenance and recreation grounds, and a second public works employee mainly responsible for sewer maintenance.

According to Mr. Sabean, the reason for the 1971 petition which added the subject area to the Village was the developer's need for assistance in gaining access to his lands. The subject area according to Mr. Sabean, contains approximately 75 acres. Exhibit K-15 shows a list of "Residents of Annapolis County in the Village of Kingston (Brookside Drive/Pinegrove Crescent)" including assessments and taxes due for each of the 50 properties. At the 1984 Village tax rate of $.20 per $100.00 of assessment, the total taxes due in 1984 for the subject area were $3,954.40. The Municipality of the County of Annapolis bills the Village 7% of the tax total for collection charges. Exhibit K-18 shows that in 1983 the tax income from the subject area represented 5.59 percent of the total tax income of the Village which was $64,035.84. In 1984 the taxable assessment of the subject area represented 5.98 percent of the total taxable assessment of the

Village which was $33,026,540.00.

According to Mr. Sabean, the Village installed sewer services in 1972-73 to a point on Highway 1 opposite Brookside Drive at a cost of $78,000.00. The design of the Village sewer system provides for the servicing of Brookside Drive/Pinegrove Crescent. The total capacity of the system is 3,000 units and to date 1500 units are hooked up, Mr. Sabean stated.

Mr. Sabean said that an important service which the Village had performed in the past for the subject area was its assistance in getting a proper entrance to Brookside Drive. The Village coordinated the turnover of the land to allow the road to be taken over by the Department of Highways (now Department of Transportation) so that protection equipment could be installed at the crossing of Brookside Drive and the Dominion Atlantic Railway line. A letter from L.B. Whiteway, Manager of Engineering Services, Department of Highways, to Mr. Robert C. Swim, Village Clerk, Kingston, dated July 3, 1974, was filed as Exhibit K-19. The letter sets out the proposed cost sharing for "the reconstruction of the Brookside, Section C to D ......, the realigned road to the Golf Club and the share of the installation of the automatic protection at the new crossing" and asks the Village Commission to convey "the right-of-way of the new Brookside Road to the Province."

Mr. Sabean gave the reasons why the Village Commission declined to agree to the request to remove the subject area from the Village. Mr. Sabean stated that any area being added to the Village involves some expense and the Commission felt that there must be some stability in planning for the area. If Brookside Drive/Pinegrove Crescent were to be removed from the Village it might be a precedent which would result in other areas wanting to opt out. This could alter the Commission's ability to recover the installation and operating cost of the sewer system, Mr. Sabean felt.

He explained that Paragon Golf Club had not been refused access to the trunk sewer across the highway from Brookside Drive but had decided not to hook up because of the expense involved in lifting the railway tracks to install sewer pipe. Although the same cost would be involved if Brookside Drive/Pinegrove Crescent were serviced, the cost could be shared among the 46 homeowners.

Mrs. Arlene Williamson, Clerk-Treasurer to the Village Commission for the past 6 years gave evidence on the alterations to Brookside Drive carried out approximately 10 years ago from her study of the Minutes of the Commission. Mrs. Williamson stated that at that time a new alignment was needed for the access road to the subject area and to the golf club because the three existing private railway crossings in the area were not adequate. According to Mrs. Williamson, the Village Commission spent $1,000.00 to acquire the land necessary for road realignment and paid approximately $6,100.00 towards the capital cost of road improvements and the installation of automatic protection equipment at the railway crossing.

Following the conclusion of the public hearing on this application, all parties submitted post-hearing briefs to the Board.

Prior to June 11, 1984, the Village Service Act, Chapter 329, R.S.N.S. 1967, Section 14 stated:

> " Subject to the approval of the Board, the boundaries of any village may by by-law from time to time be more fully described or be increased or diminished or otherwise changed provided that the area of a village shall not be increased or diminished unless two-thirds (two-thirds) of the owners of real property in the district proposed to be added to or taken from such village, have expressed a desire to that effect by a petition to the commissioners."

On June 11, 1984, the Village Service Act was amended by Chapter 41 of the Acts of 1984 which repealed Section 14 and substituted the following:

> "14 (1) An application to more fully describe or change the boundaries of a village may be made to the Board by
>
> (a) the commissioners; or
>
> (b) an owner of real property in the area proposed by the owner to be added to or taken from the village.
>
> (2) An Application to the Board by the commissioners to change the boundaries shall be accompanied by
>
> (a) a by-law passed by the commissioners describing the boundary change; and
>
> (b) a petition of two thirds of the owners of real property in the area proposed to be added to or taken from the village, approving of the change.
>
> (3) An application to the Board by an owner of real property in the area proposed to be added to or taken from the village shall be accompanied by a petition

> of two thirds of the owners of real property in the area proposed to be added to or taken from the village, approving of the change, and the application shall contain the name and mailing address of the person to whom notices and communication may be given with respect to the application.
>
> (4) Upon receipt of an application, the Board shall hold a hearing with respect to the application.
>
> (5) Notice of the date, time and location of the hearing shall be served upon the clerk of the village commissioners, the clerk of the municipality of which the village forms a part, the person named in subsection (3), if any, and the Minister.
>
> (6) At the hearing the Board shall hear any interested person or municipality.
>
> 14A (1) If it appears to the Board to be in the best interests of the inhabitants of the area, it shall order that the boundaries of the village be more fully described or changed.
>
> (2) The order made pursuant to subsection (1) shall
>
> (a) define the boundaries of the village, with any alterations made as a result of the hearing;
>
> (b) state when the new boundaries are to be effective; and
>
> (c) contain such directions respecting the implementation of new boundaries as the Board sees fit."

The issue before the Board in this application is whether or not the removal of the area proposed to be taken from the Village is "in the best interests of the inhabitants of the area."

The applicant argues that the Board should approve his request because 39 out of 46 real property owners of the subject area have signed a petition requesting removal from the Village.

He contends that the ability of the Village to provide central sewer service for the area is irrelevant because there is no need for such service and if there were, the Municipality of the County of Annapolis would be able to provide it. He argues that the average tax of $112.00 paid to the Village by property owners of the subject area is "too much for too little" because the only service provided by the Village is street lighting. The regulatory powers of the Village are practically non-existant and all problems can be and are solved by the Municipality of the County of Annapolis. The recreational, religious and professional services available in Kingston are available to all, the applicant argued, not merely property owners in the Village. Children of Brookside Drive/Pinegrove Crescent can attend schools in either Annapolis County or Kings County and are conveyed by bus to both. And finally, the applicant argues that the 1.6 km distance from the subject area to the centre of Kingston induces a feeling of separateness in the residents of Brookside Drive/Pinegrove Crescent.

Counsel for the Municipality of the County of Annapolis supports the majority of Brookside Drive/Pinegrove property owners in their desire to be removed from the Village because of their lack of affinity to the Village and because of the additional taxation which they must pay. He argues that virtually all of the services available to property owners in the subject area would be available whether or not the area is a part of the Village of Kingston. Additionally, the only direct service provided to Brookside Drive/Pinegrove Crescent by the Village is street lighting which could equally well be provided by the Municipality of the County of Annapolis.

Counsel for the Village of Kingston argued that the approval of the application would create a precedent which might encourage similar petitions from other ratepayers in the Village, that additional taxes would have to be borne by the remaining residents of the Village, and that services were provided and capital invested at the expense of all the inhabitants of the Village for the benefit of the residents of the subject area. For these reasons, Counsel for the Village submitted that the application to remove the Brookside Drive/Pinegrove Crescent area from the Village should be dismissed.

The Board visited the area proposed to be removed from the Village of Kingston. Having heard the evidence adduced at the hearing and studied the briefs submitted by all parties, the Board must decide whether to grant this application on the basis of Section 14A(1) of the Village Service Act which states:

> " If it appears to the Board to be in the best interests of the inhabitants of the area, it shall order that the boundaries of the village be more fully described or changed."

The Board must accordingly determine what area is meant in the phrase "the inhabitants of the area", i.e., whether the best interests of the inhabitants of the Village of Kingston are to be considered or the best interests of just the inhabitants of the area proposed to be taken from the Village.

Counsel for the Municipality of the County of Annapolis interprets the term "area" in Section 14A(1) as follows:

> "The term "area" might cause some confusion if it were not already referred to in Sections 14(1) and 14(2). In both cases the area referred to is "the area proposed to be added to or taken from the Village". It is therefore submitted that the Board must determine what is in the best interest of the inhabitants of the area "proposed to be added to or taken from the Village" in order to determine the result of this application.
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> ....
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> ....
>
> Even if the area referred to includes the whole Village and not just the portion sought to be deleted, it is submitted that the evidence shows that the best interests of the inhabitants would be served by deleting this area from the Village since it appears to be unfair to the residents of Brookside Drive area from both a tax point of view and also from the point of view that they have nothing in common with the Village in their own minds."

Counsel for the Village interprets "the area" in Section 14A(1) as follows:

> "In Section 14 there are four prior references to "the area", once in Section 14(1)(b), once in Section 14(2)(b) and twice in Section 14(3). In each of those cases the words "the area" are followed by a definitive clause limiting "the area" to that area proposed to be added to or taken from the Village. However, in Section 14A(1) "the area" is not defined or limited to "the area proposed to be added to or taken from the Village".

Had the intention of the legislature been to limit the Board's consideration to only the best interests of the inhabitants of the area proposed to be taken from the Village, it is submitted that it would have so stated by defining the term "the area" as had been done in the four previous references to that term.

It is further submitted that because a change in the boundaries of the Village is of such obvious concern to all of the residents of the Village it must have been the intention of the legislature that the Board in making its decision consider the best interests of all of the inhabitants."

....

....

....."In attempting to determine the legislature's intent I think it useful to look at what the Board must consider when deciding applications for boundary changes of other municipal units in the Province. Boundary changes of cities, towns and counties and wards and polling districts within them is governed by the Municipal Boundaries and Representation Act (Chapter 195 R.S. 1967). When considering boundary changes the Board is directed by Section 8 of that Act, as follows:

> "8. Upon an application to the Board, the Board shall inquire into and take into account the necessity or expediency of the Order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

Because the legislature saw fit under that Act to direct the Board to consider matters in addition to the best interests of the inhabitants of the area proposed to be taken from the municipal unit, it is submitted that it is unreasonable to assume the intention of the legislature when amending the Village Service Act was to restrict the Board to a consideration of only the best interests of those inhabitants within the area proposed to be taken from the Village when deciding on a change of Village boundaries. Thus, it is submitted that the Board in reaching its decision in this case should consider what is in the best

> interests of all of the inhabitants of the Village of Kingston.
>
> If the Board does not accept that the proper interpretation of the term "inhabitants of the area" as referred to in Section 14A(1) includes all of the inhabitants of the Village, then it is submitted that the section should be interpreted in its broadest sense. It should not be restricted to a meaning of what appears to the Board to be in the best financial interests of the inhabitants of the area but rather what is in the best overall interests of the inhabitants of the area proposed to be taken from the Village."

The Board notes that the same unqualified phrase, "the best interests of the inhabitants of the area" appears in Section 13A(1) of the Act. Section 13A(1) states:

> "If it appears to the Board to be in the best interests of the inhabitants of the area it shall order that the Act apply to the village."

The Sections of the Act which preceed Section 13A(1) outline the procedure whereby inhabitants of a village with a population of over 100 persons may make a requisition requesting a poll of ratepayers to determine if the majority of the inhabitants are in favour of the Village Service Act applying to the village. In these sections of the Act the term "area" appears in Section 3(2) and Section 12(1) only, as follows:

> "Section 3(2) The requisition shall specify the population, area and boundaries of the proposed village and may be in Form A in the Schedule. "
>
> "Section 12(1) The sheriff shall within forty-eight hours of the closing of the poll forward to the Board a return showing:
>
> (a) the date of the poll;
>
> (b) the number of votes polled;
>
> (c) the number of ballots marked "For";
>
> (d) the number of ballots marked "Against";

> together with a certificate as to the number of persons resident in such village, the boundaries and the area of the village."

In the opinion of the Board, all three sections of the Act cited above in which the term "area" appears, should be construed to mean the area to which the Village Service Act may apply.

Although "the Municipality of which the Village forms a part" is referred to in some Sections of the Act, and the Board is required at the hearing to hear "any interested person or municipality" in determining whether the Act should apply to the village, there is no reference to the necessity of considering the interests of the municipality in coming to that determination. The best interests of the inhabitants of the larger municipal unit (the municipality) of which the proposed village forms a part do not seem to be intended to be a consideration in the determination of the best interests of the smaller area to which it is proposed that the Village Service Act apply.

If the phrase "the best interests of the inhabitants of the area" in Section 13A(1) of the Act refers to the best interests of the inhabitants of the area to which it is proposed that the Village Service Act apply, i.e., those inhabitants of the geographical area most directly affected by the Board's determination, then the same phrase in Section 14A(1) may in the Board's opinion, be similarly interpreted. While it is true that the interests of all inhabitants of a Village to which the Village Service Act applies are affected in some way if an area is added to or taken from the Village, those inhabitants whose interests are most directly affected are those living in the area which will become a part of the Village or be removed from the Village. Just as the Act in Section 13A(1) does not direct the Board to specifically consider the interests of the larger municipal unit of which the proposed village is a part, so too Section 14A(1) gives the Board no direction to specifically consider the interests of the Village when determining whether an area should be taken from the Village.

In contrast to the ambiguity of Sections 13A(1) and 14A(1) of the Village Service Act, the Board concurs with Counsel for the Village that the Municipal Boundaries and Representation Act which sets out factors to be considered by the Board in determining alterations to the boundaries of cities, towns, municipalities and the wards and polling districts within them, very specifically directs the Board to consider a number of issues in relation to all ratepayers who will be affected by the Board's decision. The Board notes the anomaly between the factors to be considered in determining alterations to boundaries of all other municipal units in the Province and the absence of reference in the Village Service Act to similar factors to be considered in determining alterations to boundaries of villages to which the Village Service Act applies. The only criterion to be applied by the Board in an application for a change in Village boundaries pursuant to Section 14 of the Village Service Act is whether or not the proposed change "appears to the Board to be in the best interests of the inhabitants of the area."

The Board is unable to agree however with Counsel for the Village that "because the legislature saw fit under the Act [The Municipal Boundaries and Representation Act] to direct the Board to consider matters in addition to the best interests of the inhabitants of the area proposed to be taken from the municipal unit, ... it is unreasonable to assume the intention of the legislature when amending the Village Service Act was to restrict the Board to a consideration of only the best interests of those inhabitants within the area proposed to be taken from the Village when deciding on a change of Village boundaries." The Board cannot transpose the directions dealing with municipal boundary alterations in the Municipal Boundaries and Representation Act to the determination of this application under the Village Service Act just because the matter to be determined is similarly a proposed alteration of the boundary of a municipal unit, i.e., the Village of Kingston.

Counsel for the Village argues that if the legislature had intended to limit the Board to considering only the best interests of the inhabitants of the area proposed to be taken from the Village, the term "area" in Section 14A(1) would have been defined more specifically as it is in Section 14(1)(b), 14(2)(b) and 14(3). The Board does not presume to draw that inference from the fact that the term "area" in Section 14A(1) is unmodified by the limiting clause "proposed to be added to or taken from the Village."

Counsel for the Village further argues that "because a change in the boundaries of the Village is of such obvious concern to all of the residents of the Village it must have been the intention of the legislature that the Board in making its decision consider the best interests of all the inhabitants". The Board appreciates the logic of this argument but can find no such direction in the Act.

From the evidence adduced at the hearing, the Municipality of the County of Annapolis is willing and able to supply a level of municipal service comparable to that now received by the inhabitants of the subject area. The potential confusion over municipal jurisdiction in the subject area would be eliminated and the inhabitants of the subject area would be freed from additional taxation by the Village of Kingston if this area were removed from the Village. Many inhabitants of the area proposed to be removed from the Village alleged that they feel more affinity to Annapolis County than to the Village of Kingston or to Kings County in which the majority of the Village lies.

Taking these various factors together, the Board concludes that it is in the best interests of the inhabitants of the Brookside Drive/Pinegrove Crescent area that an order be issued to remove that area from the Village of Kingston.

An order will issue accordingly pursuant to Section 29 of the Municipal Board Act, Ch.9, S.N.S. 1981, and Section 14A(2) of the Village Service Act. The order will define the boundaries of the Village of Kingston as altered by this decision and will confirm that the new boundaries will be effective on, from and after March 31, 1985.

DATED at HALIFAX, Nova Scotia, this 28th day of February, 1985.

RH Blois

R.H. BLOIS, Chairman

E A Lawrence

ELIZABETH LAWRENCE
Vice-Chairman

Darryl W. Wilson

DARRYL W. WILSON
Member